(1) No. 95-803

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

WILLIAM C. BLACK, JR., Ph.D.,

Petitioner,

v.

UNITED STATES OF AMERICA, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Director of Central Intelligence has asserted "state secrets" privilege to block Dr. William Black, Jr. from pursuing his Constitutional Fourth Amendment and other claims against tortious conduct of the intelligence agencies. The lower courts in this case have acquiesced in the assertion of the "state secrets" privilege even though it bars a citizen from pursuing a cause of action arising from the Bill of Rights and related actions against the very conduct by the government which is restrained by the Bill of Rights. The lower courts have denied Dr. Black a forum to pursue redress of his Fourth Amendment Bivens and other claims. The questions presented are:

1. Whether the Judicial branch will sanction the use by a federal executive agency of the "state secrets" privilege to bar claims alleging unconstitutional tortious acts violating the Bill of Rights, and thereby deny the citizen a remedy to which he is otherwise entitled.

2. Whether the "state secrets" privilege can bar from the Courts a case in which a cause of action under the Bill of Rights is stated together with a related cause of action, given that this Court has ruled that the Bill of Rights is a limitation on the general powers of the government.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were William C. Black, Jr., Ph.D. (Plaintiff- appellant), and the United States of America; Central Intelligence Agency; Federal Bureau of Investigation; "Olin Peter Nielson"; John Does one through ten; unknown officials of the Central Intelligence Agency, Federal Bureau of Investigation, the Department of Defense and Department of State (Defendants- appellees).

The Petitioner before this Court is William C. Black, Jr., Ph.D., and respondents are the Defendant-appellees listed above.

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Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Dr. William C. Black, Jr. hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the District Court is not yet reported but is reprinted at Appendix ("App.") 1a. The final opinion of the district court is reprinted at App. 25a, and the earlier opinion of the district court is reprinted at App. 55a.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Eighth Circuit was entered on August 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONSTITUTION, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

a. Proceedings below

This controversy arises out of an action brought by Dr. Black against United States government agencies for violation of his right to be secure in his person and possessions under the Fourth Amendment to the Constitution, and under the Federal Tort Claims Act, 28

U.S.C. Sections 1346(g), 2401(b) and 2671 et seq., for intentional infliction of emotional distress upon him by those agencies. Jurisdiction in the district court was pursuant to 28 U.S.C. Sections 1331, 1332, 1343 (a)(3), and 1346(b)

At the district court, the then Director of Central Intelligence for the United States government interposed a claim of "state secrets" privilege as to the facts giving rise to Dr. Black's claims stated in his amended complaint. (Text of the amended complaint is reprinted at App. 96a.) The district court ruled that the claim of state secrets privilege was properly made and the facts it covered were at the core of the case, and therefore the case could go no further, and the case was dismissed.

Dr. Black appealed to the Court of Appeals for the Eighth Circuit, which affirmed the trial court after conducting an ex parte in camera review of the state secrets claim. The Court of Appeals recited that the information covered by the privilege is at the core of Black's claims, and that the litigation cannot be tailored to accommodate the loss of the privileged information.

b. Statement of Facts

Petitioner Dr. William C. Black, Jr. is an electrical engineer and has worked in the area of integrated circuit design since 1978. He received a Ph.D. in electrical engineering from the University of California at Berkeley in 1980. In the late 1970's he began performing student intern work and

contract work for government related projects for several companies, including Sandia Laboratories, Hughes Aircraft and Honeywell's Defense Systems Division. In connection with his work, Dr. Black received a Department of Energy 'Q' clearance and a Department of Defense 'Secret' security clearance although he did not perform classified work. His 'Q' clearance expired in 1981, and his DoD clearance expired in August 1987 both due to inactivity.

In November 1986 while his security clearance was still current Dr. Black began teaching technical short courses at the Swiss Federal Institute of Technology in Zurich. While there he had professional contact with a Soviet mathematician who Dr. Black felt asked

him intrusive and suspicious questions.

Dr. Black reported these questions to the U. S. Consulate as required by his security clearance and later met with Lynn Levenson, an economic officer stationed at the U. S. Embassy in Bern, regarding his contact with the Soviet mathematician. Dr. Black met with Levenson several times on his next visit to Switzerland in April 1987 at her request.

In January 1987 after Dr. Black returned to the United States he was contacted by Olin Peter Nielson who identified himself as a CIA employee. The United States has acknowledged that the name, Olin Peter Nielson, is an alias. "Nielson" questioned Dr. Black about his contact with the Soviet

mathematician, and instructed him to report any foreign travel plans to "Nielson". "Nielson" did not specifically ask Dr. Black to be an informant, but Petitioner cooperated with "Nielson" because he thought he was obligated to do so as he was still covered by a security clearance.

"Nielson" continued to contact Dr. Black about the Institute in Zurich and the Soviet mathematician, even to the extent of contacting Dr. Black at his father's house in Iowa when Dr. Black had not told "Nielson" of his plans to be in Iowa. After his security clearance expired in August 1987 Dr. Black decided he did not need to report any information to "Nielson" or Levenson, and although he returned to Europe to teach short

courses and informed "Nielson" in advance of this trip, he did not report back about this trip until after he began to be harassed.

In October 1987 Dr. Black became the subject of a concerted effort of harassment and psychological attack. Dr. Black's apartment was repeatedly entered without his permission in his absence and items moved or rearranged. His automobile was similarly entered and disturbed.

Further Dr. Black observed that very noticeable patterns of filament stitching were sewn into his living room carpet and changed appearance, sometimes day to day. During this period Dr. Black heard repetitive loud sounds of rolling dice from a nearby apartment when

he entered or left his apartment. He received strange telephone calls and false fire alarms, and on several occasions was overtly followed.

In early January 1988 persons thought to be government agents visited Dr. Black's father, causing Dr. Black to write "Nielson" to inquire about the purpose of this visit. "Nielson" telephoned Dr. Black to deny CIA involvement and said "it must have been the other side" that visited his father. Following this incident, Dr. Black sought medical treatment for extreme stress and anxiety for the first time in his life.

Later in January 1988 "Nielson" called Dr. Black and requested that he meet with "a few other people". On

February 4, 1988 Dr. Black met with "Nielson" and three other persons, two of whom were described as being from Washington, D. C., and the third a field man. At the end of this meeting "Nielson" talked about the CIA's role of "enforcement", and how this enforcement role interfered with collection of information. Dr. Black took these comments as threatening.

In late February 1988 after Dr. Black inquired as to the nature of any monitoring of his affairs, "Nielson" informed Dr. Black that there would be no more direct contact with him. Following this conversation the harassment of Dr. Black resumed after a short hiatus. His automobile was entered and disturbed. The loud amplified noises

began again from the neighboring apartment. Dr. Black received numerous hang-up and tape-recorded telephone calls, including calls that displayed knowledge of his contemporaneous actions in his apartment.

In March 1988 Dr. Black's apartment was entered again and disturbed, and he discovered that a foreign substance had been deposited on his bed and sofa which caused him to suffer numbness and hallucinations after touching the substance.

As a result of this harassment Dr. Black became extremely anxious and physically ill, resulting in his hospitalization in April 1988. On May 3, 1988, the day before his release from the hospital, a mysterious deposit was made

into one of Dr. Black's brokerage accounts in an amount approximately equal to the bill for his hospitalization.

Subsequent to his hospitalization the harassment continued into 1990, including harassing telephone calls and an entry into his apartment. Harassing telephone calls continued into 1992.

In early 1989 Dr. Black filed Freedom of Information Act requests with the CIA, FBI and Department of State, and received some information from his files. He also contacted United States Senator David Durenberger to make inquiries into this matter, and Dr. Black's office was broken into shortly thereafter.

Due to the content of the harassing telephone calls and the circumstances of other of the acts of invading his home

and car, Dr. Black believes the harassment and break-ins are the acts of United States government agents, and are related to Dr. Black's contacts with the CIA and other U. S. agencies. Dr. Black commenced his action in United States District Court in Minnesota in September 1992.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE LOWER COURTS PERMIT THE EXECUTIVE BRANCH TO DEFEAT A CITIZEN'S FOURTH AMENDMENT RIGHTS WITH A UNILATERAL, SECRET AND UNCHALLENGEABLE CLAIM OF STATE POWER. SUCH A CLAIM VIOLATES THIS COURT'S HOLDING IN THE "PENTAGON PAPERS" CASE THAT THE BILL OF RIGHTS IS A LIMITATION ON THE GENERAL POWERS OF THE GOVERNMENT.

The Supreme Court has spoken on the

scope and extent of the "state secrets" privilege only once, in the Korean War era case United States v. Reynolds, 345 U.S. 1 (1953). The Court has never spoken on a conflict between assertion of state secrets and the rights of the citizen under the Bill of Rights. This Court in the Reynolds case took notice of the war conditions at the time of that matter, stating, "In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense." Id. at 10. The limited use of the privilege permitted in that case was stated to be required in light of transitory defense considerations.

The result in Reynolds was that the plaintiff's actions for wrongful death

brought under the Federal Tort Claims Act were remanded and allowed to proceed in the trial court, as this Court found that the sensitive information at issue was not relevant to the issues of causation of the accident. Unlike the case at hand the Plaintiffs in Reynolds were given their day in court on their claim.

This Court stated, "(t)herefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets." Id. at 11.

In the instant case, the state secrets concept has expanded dramatically to bar from consideration by the courts a Constitutionally based cause of action arising from violation of a citizen's

fundamental right under the Fourth Amendment to be secure in his person, house, papers and effects.

The instant case then poses a question which goes to the heart of the Constitution- may the government unilaterally bar a claim based upon the government's unconstitutional acts in violation of the citizen's rights under the Bill of Rights?

The U. S. government and the lower courts in this case believe that "state secrets" is a concept so unassailable that it will outweigh the protections of the Bill of Rights. This Court has certainly never expressed such an opinion, and in fact has expressed the contrary opinion in the "Pentagon Papers" case in which the United States

attempted to restrain the New York Times and the Washington Post newspapers from printing a classified report on the Vietnam war.

In that case this Court considered the history of the Bill of Rights and held that the first ten amendments to the Constitution, adopted after the main body of the Constitution, were intended to be limitations on the general powers of government. "The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution." New York Times Company v. United States, 403 U.S. 713, 716 (1971). The holding in that case was that the general powers of the federal

government could not defeat the provisions of the Bill of Rights.

Similarly, in criminal cases the United States may not invoke state secrets and maintain a prosecution against an individual, as the government has "the duty to see that justice is done." Reynolds at 12. This Court distinguished Reynolds as a civil case in which the United States "is a defendant only on the terms to which it has consented" under the Federal Tort Claims Act. Id.

The cause of action in this case does not rely on consent by the United States to be sued, rather this Court created a cause of action based on violations of the Fourth Amendment in the case of Bivens v. Six Unknown Agents, 403

U.S. 388 (1971). In that case this Court quoted the seminal case of Marbury v. Madison, "(t)he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Bivens, 403 U.S. at 397. This Court found the cause of action to arise from the language of the Fourth Amendment itself, and the Petitioner in this case pled such a cause of action. Id.

Nor is the state secrets privilege one which is well based in U. S. law other than the Reynolds case. The Court of Appeals cites the case of Totten v. United States, 92 U.S. 105 (1875), yet that case does not relate to a state secrets evidentiary privilege and is not

authority for such a concept. Rather the reasoning of Totten is that a contract for services by a secret agent is one that requires secrecy on behalf of the agent, and therefore the agent has violated the contract by bringing action for payment in the courts. There were no constitutional issues in Totten, and certainly no consideration of the Bill of Rights and its limitation on the general power of government.

The other case cited by the Court of Appeals is United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). Yet the result in this part of the Burr case does not establish a state secrets privilege, rather the issue is deemed avoided by the court on the facts. Chief Justice Marshall in the opinion does

raise the troubling prospect of how to maintain a criminal prosecution if evidence is claimed to be secret, a question answered in the Reynolds opinion in which the Court stated that no criminal prosecution could be maintained where the government claimed secrecy for relevant evidence. The Burr decision cited does stand for the proposition that in the United States as opposed to England the chief executive is not above the law and is bound by the provisions of the Constitution and thus subject to subpoena by a Court. Id. at 34.

II. THERE IS NO AUTHORITY FOR THE PROPOSITION THAT THE BILL OF RIGHTS IS OVERRIDDEN BY THE STATE SECRETS PRIVILEGE, AS OCCURRED IN THIS CASE.

The Court of Appeals did not weigh

the constitutional issues raised in this case where the privilege was used to defeat a Bivens claim, and in fact the Burr opinion cited supports the long established view that Constitutional provisions are paramount and must be upheld.

Nor does the Reynolds case in any way provide authority for the proposition that the privilege can bar a claim under the Bill of Rights. The Reynolds decision involves a civil dispute in which a wrongful death claim has been filed, rather than a Constitutional cause of action.

The Court in Reynolds acknowledged that "judicial experience with the privilege which protects military and state secrets has been limited in this

country". Id. at 6. The Court noted that there had been more experience in England, though still relatively slight, but cited the British House of Lords decision Duncan v. Cammell, Laird & Co. (1942) A.C. 624. This case also involved a commercial dispute touching on military operations during the Battle of Britain phase of World War II. Obviously, a British case would not consider the impact of the Bill of Rights of the United States Constitution upon an assertion of a governmental privilege.

This Court has never discussed or analyzed the effect of an assertion of "state secrets" privilege on a claim based on the Bill of Rights, other than to protect the individual in a criminal case context. It is axiomatic that for

the Bill of Rights to have any meaning it cannot be subverted by a claim of governmental privilege, as has occurred here. Further in the context of numerous contemporary disclosures of dishonest actions within the intelligence agencies of the United States, it is little protection for the individual that an ex parte in camera presentation to the lower courts be given uncritical acceptance by the judiciary.

Recent disclosures of misconduct in the intelligence agencies, and particularly the covert operations directorates of the intelligence agencies require that the courts not default in their constitutional role to protect the individual from abusive state power.

The intelligence agencies are part

of the United States government, and their behavior is limited by the protections of the Bill of Rights. It is constitutionally impermissible to exempt the behavior of these institutions from constitutional control and accountability, for the whole of human history teaches that unaccountable power results in corrupted power. This nation was founded in opposition to this trend of human history, and this Court is bound by oath to protect the citizens of this country from such actions. The nation has been through a difficult time of war and cold war, and many habits have developed in contravention of the intention of the Constitution, and this Court needs to speak clearly to the growing concern in the nation that the

Constitution has lost its force as a limitation on unbridled state power. One might argue that the future of our nation depends on this Court revitalizing the spirit of the nation through clear decision that the power of the state is limited by the Bill of Rights, and that the citizen is supreme where the Constitution so provides.

CONCLUSION

In sum for the foregoing reasons this case presents an important unresolved constitutional issue of great contemporary importance. A writ of certiorari should issue to review the judgement of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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November 7, 1995

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OCTOBER TERM, 1995

WILLIAM C. BLACK, JR., Ph.D.,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Memorandum Opinion and Order of the United States District Court for the District of Minnesota Third Division in William C. Black, Jr. v. United States of America et al., CV 3-92-628 (D. Minn. April 2, 1993)....55a

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United States Court of Appeals
For the Eighth Circuit

No. 94-2261

William C. Black, Jr., Ph.D,	:	
Appellant,	:	
v.	:	
United States of America; Central Intelligence Agency; Federal Bureau of Investigation; Olin Peter Nielson; John Does; one through ten, unknown officials of the Central Intelligence Agency, Federal Bureau of Investigation, the Department of Defense, and the Department of State,	:	Appeal from the United States District Court for the District of Minnesota
Appellees.	:	

Submitted: February 13, 1995

Filed: August 15, 1995

Before BOWMAN, BEAM and HANSEN, Circuit Judges

BOWMAN, Circuit Judge.

On the basis of the government's assertion of the state secrets privilege, the District Court 1/ dismissed the plaintiff's Federal Tort Claims Act (FTCA) and Bivens claims. The plaintiff, William C. Black, Jr. appeals. We affirm.

Black is an electrical engineer who possessed government security clearances and worked on military-related projects for various defense contractors. In November 1986 he lectured at the Swiss Federal Institute of Technology in Zurich where a Soviet mathematician, his office

1/ The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

mate, allegedly asked him intrusive and suspicious questions. This contact was reported by Black to the United States Consulate and allegedly resulted in several meetings between him and embassy personnel.

In July 1987, after his return to the United States, Black states that he met with an individual operating under an alias who identified himself as a CIA employee ("Nielson") and who questioned Black about his contact with the Soviet national. In August, Black was informed that his security clearance had been "unplugged" due to inactivity, and he did not transmit any information about the mathematician or Black's connection with the Institute after a September trip to Switzerland. Black claims that,

beginning in October, he "became the focus of a campaign of harassment and psychological attacks. Unknown people entered his apartment and rearranged things; he was followed; he received many strange phone calls; and he was repeatedly subjected to the sound of rolling dice from a neighboring apartment when he entered or left his home." Brief of Appellant at 3. Nor did Black's alleged tormentors content themselves with "shaking the bones"; "[h]is home and car were broken into. He received calls indicating his home was bugged. He was drugged in his own home with a substance that produced terrifying hallucinations." Id. at 4. 2/ Black claims that he was

2/ Black alleges that this campaign of abuse also included "planting bugging devices in the form of filaments sewn

terrified, angry, hurt, and drawn to seek psychiatric counseling by this abuse. He charged the United States, the CIA, the FBI, the Department of Defense, the Department of State, Nielson, and ten John and Jane Does (alleged to be employees of the CIA, the FBI, the Department of Justice, and the Department of Defense) with violations of his Fourth Amendment rights. Black also alleged a right to recover under the FTCA for negligence (breach of a duty owed to

---

into his carpet;...setting off false fire alarms; spraying his furniture with a substance which caused plaintiff to suffer hallucinations upon contact; causing an elderly couple to follow him; and making deposits in one of his brokerage accounts in the amount of his hospital bill." Black v. United States, Civ. No. 3-92-628, Memorandum Opinion and Order at 3 (D. Minn. April 2, 1993).

obtain informed consent before using him as an informant or a "subject of experimental research," Complaint paragraph 41, No. 3-92-CV-628 (Sept. 15, 1992), for assault and battery, and for intentional infliction of emotional distress.

On motion by the government seeking dismissal of the FTCA claims, the District Court dismissed Black's claims of negligence and assault and battery, allowing the claim for intentional infliction of emotional distress to proceed and directing Black to file an amended complaint with respect to this claim. Black's Fourth Amendment claim, brought under the doctrine of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389

(1971) (holding unreasonable search and seizure by federal agent under color of authority gives rise to Fourth Amendment cause of action for damages), was unaffected and was reasserted in Black's amended complaint. In response to the amended complaint, the government filed a public declaration by R. James Woolsey, Director of the CIA, asserting a formal claim of state secrets privilege, exempting from disclosure information that would confirm or deny Black's alleged contacts with government officers, including identities, nature and purpose of possible contacts, and locations. The Director further proffered in camera ex parte declarations that elaborated on the reasons for assertion of the privilege. After an in

camera review of the classified materials, and based on these materials and the Director's public statement, the court held that the state secrets privilege had been properly asserted. Specifically the court noted

> that Director Woolsey properly invoked the state secrets privilege, since disclosure of information concerning the identities of government agents, the nature and purposes of their contacts, if any, with Black, or the locations of those contacts would pose a "reasonable danger" to the United States' intelligence-gathering capabilities and diplomatic relations. See Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991). Specifically, confirming or denying Black's allegations that he was contacted by agents of the CIA would provide foreign intelligence analysts with information concerning this nation's intelligence priorities and procedures. Halkin v. Helms, 690 F.2d 977, 993 (D.C. Cir. 1982) ("Halkin II"). In addition, the government's intelligence relationships with other countries

> could be put at risk, either by requiring the United States to confirm or deny that it (a) conducts intelligence operations in those countries, and (b) has targeted locations in those countries as sources of intelligence. Id. The same conclusion holds for requiring the United States to release information concerning those topics during discovery -- indeed, discovery would present even greater threats to the government's intelligence activities, since discovery would require the government to disclose specific facts concerning those subjects.

Black v. United States, Civ. No. 3-92-628, Memorandum Opinion and Order at 6-7 (D. Minn. April 18, 1994).

As a consequence, the court also held that Black's remaining FTCA claim must be dismissed because, absent the prohibited information, Black would not be able to establish whether the perpetrators of the alleged acts were

agents or employees of the government. Further, proof of "the factual allegations in the Amended Complaint are so tied to the privileged information that further litigation will constitute an undue threat that privileged information will be disclosed." Black v. United States, Civ. No. 3-92-628, Memorandum Opinion and Order at 11 (D. Minn. April 18, 1994). Similarly, the court held that Black's Bivens claim must be dismissed because "information concerning the identity of the alleged wrongdoers, their relationship to the government, and their contacts with Black are essential" to the claim, and such information "falls within the scope of the state secrets privilege upheld herein." Id. at 13. The protected

information precludes Black from establishing a prima facie Bivens claim and, as under the FTCA claim, continued litigation carries with it the risk that privileged information might be disclosed. 3/ The court dismissed with prejudice Black's claims as set forth in the amended complaint. He appeals.

Black argues that the trial court erred 1) in granting the government's motion to dismiss, because the assertion of evidentiary state secrets privilege was overbroad, 2) in failing to recognize that the defendants were acting beyond their legal and constitutional authority and thus lacked the power to validly claim the state secrets privilege, and 3)

3/ The court refused to consider an in camera trial utilizing the privileged information.

in refusing to accept separate claims against all potential government agencies.

II.

Black's first argument is that the trial court erred in granting the government's motion to dismiss, because the claim of evidentiary state secrets was overbroad. The state secrets privilege is defined in United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (footnotes omitted), as protecting military and state secrets.

> [T]he principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department

> which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

The state secrets privilege has been held to apply to information that would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments, "Ellsburg v. Mitchell 709 F.2d 51, 57 (D.C. Cir. 1983) (footnotes omitted), cert. denied, 465 U.S. 1038 (1984), or where disclosure "would be inimical to national security," Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991). "Although the term 'military or state

secrets' is amorphous in nature, it should be defined in the light of 'reason and experience,' much in the same way that the term 'national defense' has been defined...[as] a 'generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.'" Jobara v. Kelley, 75 F.R.D. 475, 483 n. 25 (E.D. Mich. 1977) (quoting Gorin v. United States, 312 U.S. 19, 28 (1941)). It is not proper to characterize this, as does Black, as some "creature" of the Cold War; the privilege preceded that state of affairs, 4/ and having an independent existence, cannot

4/ See Totten v. United States, 92 U.S. 105, 107 (1875); United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14, 692d).

be held to have terminated with the (current, and perhaps temporary) demise of superpower rivalry. Indeed, it could be argued that the absence of a relatively stable world order of the sort that prevailed during the Cold War makes the availability of the privilege in appropriate cases all the more important.

While the state secrets privilege is not to be lightly invoked, a process safeguarded by the Supreme Court's requirement that the head of the relevant government department make a formal claim after personal perusal of the matter, see Reynolds, 345 U.S. at 7-8, nevertheless "the court must accord the '"utmost deference"' to the executive's determination of the impact of disclosure

on military or diplomatic security." 5/ Zuckerbraun, 935 F.2d at 547 (citations to quoted cases omitted). Even the most compelling need cannot force a disclosure

5/ This is due at least in part to the difficulty in assessing what effect a particular disclosure will have on national security, particularly when such a determination is made by the uninitiated.

> The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

Ellsberg v. Mitchell, 709 F.2d 51, 58 n.31 (D.C. Cir. 1983) (quoting United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972)), cert. denied, 465 U.S. 1038 (1984).

of the very thing the privilege is invoked to protect. See Reynolds, 345 secrets is necessary not only during a court's review of the evidence, but in its subsequent treatment of the question in any holding; a properly phrased opinion should not strip the veil from state secrets even if ambiguity results in a loss of focus and clarity. Such proceedings, "involving delicate and sensitive intelligence communications," should be distinguished from more ordinary forms of discovery, such as Freedom of Information Act (FOIA) requests. North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 n.9 (8th Cir. 1978).

Assessment of a claim of state secrets privilege may require an in

camera ex parte examination by the judge. See Ellsberg, 709 F.2d at 57 n.31. Black's argument that such proceedings "are an inappropriate means to resolve disputed issues of privilege," Brief of Appellant at 19, is simply incorrect. 6/ The lower court correctly employed such a procedure in reviewing the government's state secrets claim. See Black v. United States, Civ. No. 3-92-628, Memorandum Opinion and Order at 5-6, (D. Minn. April 18, 1994). Our independent in camera ex parte review of the government's state secrets claim similarly convinces us that

6/ In re Eisenberg, 654 F.2d 1107 (5th Cir. 1981), which Black cites for this statement, actually reads: "It is settled that in camera proceedings are an appropriate means to resolve disputed issues of privilege." 654 F.2d at 1112 n.7 (citing Kerr v. United States District Court, 426 U.S. 394 (1976)).

it was not overbroad, and that the trial court did not err in granting the motion to dismiss. The information covered by the privilege is at the core of Black's claims, and we are satisfied that the litigation cannot be tailored to accommodate the loss of the privileged information.

III.

Black's second argument is that the trial court failed to recognize that the defendants' ultra vires actions prevented them from validly claiming the state secrets privilege. Black claims that the CIA illegally performed domestic surveillance on him in contravention of 50 U.S.C. Section 403-3(d)(1) (Supp. V 1993), and he cites Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978), and

Weissman v. Central Intelligence Agency, 565 F.2d 692 (D.C. Cir. 1977), as authority. 7/ Weissman, a FOIA case,

7/ 50 U.S.C. Section 403-3(d)(1) (Supp. V 1993) reads as follows:

> In the Director's capacity as head of the Central Intelligence Agency, the Director shall --
>
> (1) collect intelligence through human sources and by other appropriate means, except that the Agency shall have no police, subpoena, or law enforcement powers or internal security functions;
>
> ....

In the cases cited, the provision referred to is 50 U.S.C. Section 403(d)(3) (1976), and reads as follows:

> For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council --
>
> ...
>
> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no

concerned "[a] full background check within the United States of a citizen who never had any relationship with the CIA." 565 F.2d at 696. In Birnbaum, the Second Circuit affirmed, with modification, judgment allowing damages for the CIA's unauthorized opening of letters. The court observed that

> the CIA was not to become concerned with developing intelligence as to domestic or internal security matters, except "for protecting intelligence sources and methods from unauthorized disclosure." Section 102(d)(3), 50 U.S.C. Section 403(d)(3). The subject matter of the Agency's interest was to be foreign activity, not activity at home, and the Agency was not to have any "internal security functions." Section 102(d)(3), 50 U.S.C. Section 403(d)(3).

588 F.2d at 331 (footnote omitted). If Black is correct about CIA surveillance

police, subpena [sic], law-enforcement powers, or internal-security functions...

of him, and we assume arguendo that he is, his reported contact with a suspicious foreign national outside the United States places the matter in the arena of foreign activity and thus within the CIA's competence. Assuming, in the alternative, that the FBI was responsible for the surveillance Black alleges, no case has been made for ultra vires activity. It is equally possible, of course, that the crank calls, hallucinatory furniture, and elderly shadowers alleged by Black are products of a vivid scientific imagination. This Court has considered all these possibilities and has reviewed the available evidence, including the Director's in camera ex parte declarations. It is our conclusion that

if any activities were conducted by the government in connection with Black, they were not ultra vires.

IV.

Black's final contention is that the trial court erred in refusing to accept separate claims against all potential government agencies. This argument is somewhat difficult to fathom, but we need not and do not plumb its depths, for two reasons, either of which is sufficient. First, because of our holding affirming the District Court's dismissal of Black's claims in light of the government's assertion of the state secrets privilege, the issue is moot. Second, the issue relates to rulings made by the District Court in connection with Black's original complaint. Black's notice of appeal,

however, refers only to the dismissal of the claims in his amended complaint. Thus the issue, even if it were not moot, would not be properly before us for review. See Berdella v. Delo, 972 F.2d 204, 207 (8th Cir. 1992).

V.

The judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

William C. Black, Jr.,

Plaintiff,

vs.

United States of America et al.,

Defendants.

Civ. No. 3-92-628
MEMORANDUM OPINION AND ORDER

Clinton Collins, Jr., Minneapolis, Minnesota, for plaintiff.

Gordon W. Daiger and Matthew T. Fricker, United States Department of Justice, for defendant United States of America.

Introduction

Plaintiff William C. Black, Jr. commenced this action against the United States of America and several unknown individuals who are alleged to have been officials of the Federal Bureau of

Investigation ("FBI"), Central Intelligence Agency ("CIA"), and Department of State ("State Department"); Black alleges that the United States is liable under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Sections 1346(b), 2674 (1988), for the intentional infliction of emotional distress occasioned by the individual defendants. He further alleges that the individual defendants are liable for injuries caused by their having deprived him of his rights under the Fourth Amendment to the United States Constitution. Before the Court is the defendant United States' Motion, pursuant to Fed. R. Civ. P. 12(c), for Judgment on the Pleadings; the United States contends that the "state secrets" privilege applies here and

requires that this action be dismissed without further litigation.

Background

The essential facts underlying this action are set forth in the Court's April 2, 1993 Memorandum Opinion and Order ("First Order") in which the Court dismissed Black's FTCA claims against the United States for negligence and assault and battery. 1/ On April 27, 1993 Black filed an Amended Complaint alleging a

1/ The Court concluded that Black's negligence claim should be dismissed because Minnesota law did not provide a legal basis for such a claim. See First Order, at 11-12. Black's assault and battery claim was dismissed as barred by the two-year statute of limitations on FTCA claims contained in 28 U.S.C. Section 2401(b). Id. at 17-18. In addition, the Court ordered Black to file an Amended Complaint alleging facts supporting his claim of intentional infliction of emotional distress. Id. at 19.

FTCA claim for intentional infliction of emotional distress (Count I) and a Bivens 2/ style claim for violations of his Fourth Amendment rights (Count II). Although the causes of action alleged in the Amended Complaint differ from those alleged in the Complaint, the factual allegations contained in both pleadings are substantially identical; hence, they will not be repeated here.

Upon Black filing his Amended Complaint, the United States sought

2/ Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971). In Bivens, the Supreme Court held that damages may be awarded where federal officers knowingly violate an individual's Fourth Amendment rights, if (1) the individual has no other remedy, and (2) there is no explicit congressional declaration that persons injured by a federal officer's violation of the Constitution may not recover money damages.

dismissal of this action under Fed. R. Civ. P. 12(b)(6), relying on the "state secrets" privilege, which was asserted by R. James Woolsey, Director of Central Intelligence, in his public record declaration dated August 4, 1993 ("Woolsey Declaration") (Doc. No. 39). For reasons unrelated to the instant motion, the Court directed the United States to file an Answer to the Amended Complaint. Upon filing its Answer, the United States brought the instant motion, once again asserting that dismissal was warranted under the state secrets privilege.

Discussion

I. Applicability of the State Secrets Privilege

The state secrets privilege, first recognized by the Supreme Court in United

States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L.Ed.2d 727 (1953), is a common law evidentiary privilege that protects information from discovery when disclosure "would be inimical to the national security." In re United States, 872 F.2d 472, 474 (D.C. Cir.), cert dismissed sub nom. United States v. Albertson, 493 U.S. 960 (1989). Where applicable, the privilege is clear and absolute, and no public or private interest, even the most compelling need for the information, can require disclosure of information subject to the privilege. Reynolds, 345 U.S. at 11, 73 S. Ct. at 533; Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied sub nom. Russo v. Mitchell, 465

U.S. 1038 (1984). 3/

Invoking the privilege requires, at a minimum, "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." Reynolds, 345 U.S. at 8, 73 S. Ct. at 532. Merely complying with the formal requirements, however, is not sufficient to warrant a district court upholding the assertion of the privilege: "[t]o some degree at least, the validity of the government's assertion must be

3/ The plaintiff's need for the information, however, is relevant as a factor influencing how far the district court should probe in satisfying for itself that the circumstances are appropriate for invoking the privilege, Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 400 (D.C. Cir. 1984); the more compelling the need, the more searching the court's inquiry.

judicially assessed," Molerio v. Federal Bureau of Investigation, 749 F.2d 815, 822 (D.C. Cir. 1984), in order that "[j]udicial control over the evidence in a case [is not] abdicated to the caprice of executive officers." Reynolds, 345 U.S. at 9-10, 73 S. Ct. at 532-33. The district court, therefore, must determine whether the circumstances are appropriate for allowing the privilege to be claimed; however, that inquiry must be conducted with care, "so as not to 'force disclosure of the very thing the privilege is designed to protect.'" In re United States, 872 F.2d at 475 (quoting Reynolds, 345 U.S. at 8, 73 S. Ct. at 532 (footnote omitted)). Accordingly, "[t]o properly fulfill its obligations, while according the 'utmost

deference' to the executive's expertise in assessing privilege upon grounds of military or diplomatic security, a court must uphold the privilege if the government shows that the information poses a reasonable danger to secrets of state." 4/ In re United States, 872 F.2d at 475 (citations omitted).

The United States, through the Woolsey Declaration, complied with the

4/ Determining whether information falls within or without the privilege is made more difficult by the increasingly sophisticated technology and methods available in the foreign intelligence community. Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978) ("Halkin I"). Thus, as the District of Columbia Circuit noted in In re United States, a court should uphold the privilege for "information that standing alone may seem harmless, but that together with other information poses a reasonable danger of divulging too much to a 'sophisticated intelligence analyst.'" In re United States, 872 F.2d at 475 (quoting Halkin I, 598 F.2d at 10).

formal requirements set forth in Reynolds. The Woolsey Declaration states that Director Woolsey is

> asserting a formal claim of privilege...based upon [his] personal knowledge, upon information provided to [him] in [his] official capacity by personnel of the United States government who are knowledgeable about the facts covered by the declaration, and upon [his] personal consideration of the information that is the subject of this claim of privilege.

Woolsey Dec. Paragraph 3. As asserted, the privilege would extend to (1) confirming or denying (a) the identities of the government individuals and entities allegedly involved in the actions detailed in the Amended Complaint, (b) the nature and purposes of the contacts between Black and any government agents or entities, and (c) the locations of those contacts, id.

Paragraph 5, or (2) answering discovery requests requiring disclosure of that information. Id. Paragraph 4. Along with the Woolsey Declaration, the United States submitted declarations in support of Director Woolsey's invocation of the privilege; 5/ they were reviewed by the Court on an ex parte in camera basis. 6/

5/ As will be discussed below, the information subject to the privilege is central to Black's claims; hence, his need for the information is compelling. Under such circumstances, the Woolsey Declaration, standing alone, was insufficient to support upholding the privilege; thus, the court directed the United States to submit the declarations for the Court's review. See Ellsberg, 709 F.2d at 58-59 and nn. 37-38.

6/ The Court declined to adopt Black's assertion that his counsel, a legal officer in the Minnesota Air National Guard, has a security clearance sufficient to permit him to review the proffered declarations. Ellsberg, 709 F.2d at 61 (a trial judge should not

After reviewing the Woolsey Declaration and the ex parte in camera declarations, the Court holds that Director Woolsey properly invoked the state secrets privilege, since disclosure of information concerning the identities of government agents, the nature and purposes of their contacts, if any, with Black, or the locations of those contacts would pose a "reasonable danger" to the United States' intelligence-gathering capabilities and diplomatic relations. See Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991). Specifically, confirming or denying Black's allegations that he was contacted

permit a party opposing the privilege to participate in an in camera examination of putatively privileged material).

by agents of the CIA would provide foreign intelligence analysts with information concerning this nation's intelligence priorities and procedures. Halkin v. Helms, 690 F.2d 977, 993 (D.C. Cir. 1982) ("Halkin II"). In addition, the government's intelligence relationships with other countries could be put at risk, either by requiring the United States to confirm or deny that it (a) conducts intelligence operations in those countries, and (b) has targeted locations in those countries as sources of intelligence. Id. The same conclusion holds for requiring the United States to release information concerning those topics during discovery -- indeed, discovery would present even greater threats to the government's intelligence

activities, since discovery would require the government to disclose specific facts concerning those subjects. The Court, therefore, holds that information concerning the identities of any government agents who may have contacted Black, the nature and purposes of those contacts, and the locations of those contacts are absolutely privileged from confirmation or denial in a responsive pleading and discovery. 7/

7/ The Court rejects Black's assertions that the privilege should not be upheld because it (a) has been waived by prior disclosure of Director Woolsey's Oath of Office or any other information under the Freedom of Information Act, and (b) should be narrowly construed when an intentional tort is alleged. See In re Underseal, 945 F.2d 1285 (4th Cir. 1991) (claim for malicious interference with business); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 281 (4th Cir. 1980) (en banc) (claim for tortious interference with contract), prior panel decision, 635 F.2d 268 (4th Cir.); Maxwell v. First

II. Effect of the Privilege on this Litigation

A. The Standard of Decision

The United States contends that judgment on the pleadings is appropriate because the state secrets privilege presents an insuperable bar to this litigation. Ordinarily, a motion for judgment on the pleadings is determined under the same standard applied to

Nat'l Bank of Maryland, 143 F.R.D. 590 (D. Md. 1992) (claim for intentional infliction of emotional distress), aff'd 998 F.2d 1009 (4th Cir. 1993 (table), cert. denied, 114 S. Ct. 920 (1994). The Court also rejects Black's assertion that the privilege is not available to shield the government from liability for illegal acts. Whatever the truth of that statement, the government's submissions in support of the privilege establish that it is being asserted in the interest of national security, and not to hide illegal acts. Moreover, it is accepted that a successful assertion of the privilege may defeat "worthy claims for violations of rights that would otherwise be proved." In re United States, 872 F.2d 472, 476 (D.C. Cir. 1989).

motions, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss for failure to state a claim. See National Car Rental Systems, Inc. v. Computer Assoc. Int'l, Inc., 991 F.2d 426, 428 (8th Cir. 1993). The instant motion, however, has required the court to consider matters outside the pleadings, namely, Director Woolsey's on-the-record Declaration (Doc. No. 39), the ex parte in camera submissions offered in support thereof, and Black's Exhibit in opposition to the motion; hence, the government's rule 12(c) will be construed as one for summary judgment under Fed R. Civ. P. 56. 8/ See Fed. R. Civ. P. 12(c). By submitting their extra-pleadings

8/ Moreover, the summary judgment standard has particular utility in evaluating the effect of the privilege at issue in this case. See Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991).

matters, the parties had constructive notice of the court's intention to consider matters outside the pleadings. See Goetz v. Tordoff, App. No. 93-1842, slip op., at 3 (8th Cir. Apr. 13, 1994).

Under Rule 56:

> [summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). In determining whether summary judgment is

appropriate, the evidence offered by the non-moving party is to be believed and all justifiable inferences therefrom are to be drawn in a light most favorable to that party. Matsushita Elec. Indus. v. Zenith Radio, 475 U.S., 574, 587, 106 S. Ct. 1348, 1357, 89 L.Ed.2d 538 (1986); Liberty, 477 U.S. at 255, 106 S. Ct. at 2513; Trnka v. Elanco Prod., 709 F.2d 1223, 1225 (8th Cir. 1983).

B. When the Privilege Warrants Dismissal

Once successfully invoked, the effect of the privilege is to completely remove the evidence from the case, Ellsberg v. Mitchell, 709 F.2d 51, 65, cert denied sub nom. Russo v. Mitchell, 465 U.S. 1038 (1984); as a result, the district court must consider whether and

how the case may proceed in light of the excluded evidence. Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1243 (4th Cir. 1985). If the plaintiff is, or will be, unable to establish a prima facie case without the privileged information, or if the privileged information is "so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters," dismissal or summary judgment is appropriate. Id. (citation omitted); see Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991) (per curiam). Similarly, if the information is essential to the defense, such that upholding the privilege will preclude the government from asserting a valid defense to the claim, summary

judgment against the plaintiff may be appropriate. 9/ In re United States, 872 F.2d at 476. In every case, however, dismissal is "draconian," id.; thus, it should be invoked "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard [the] privileged material." Fitzgerald, 776 F.2d at 1243-44; see Bowles, 950 F.2d at 156.

In this case, the question thus becomes, in light of the Court's

9/ Although the government relies on this ground in seeking dismissal of Black's FTCA claim (Reply Mem. Supp. Summ. J., at 8-9.), it has not identified any privileged facts that constitute a defense to that claim. As a result, there is no basis for concluding that upholding the privilege precludes the government from asserting a valid defense. Cf. Molerio v. F.B.I., 749 F.2d 815, 825 (D.C. Cir. 1984) (privileged facts submitted by government established a defense to plaintiff's claim).

determination that (a) the United States may not be required to confirm or deny Black's allegations concerning the identities of the persons and government entities with whom he allegedly had contact, the nature and purposes of those contacts, and the locations of those contacts, and (b) Black will not have access to that information through discovery, can Black's claims against the defendants proceed in light of the privilege?

C. Black's FTCA Claim

Black's FTCA claim in Count I must be dismissed for two reasons. First, establishing a right to relief under the FTCA, requires Black to demonstrate that employees of the federal government engaged in intentional infliction of

emotional distress 10/ while acting within the scope of their office or employment. 28 U.S.C. Section 1346(b). Since the identity of those employees is privileged, Black will not have access to facts necessary to establish a genuine issue of material fact as to whether the alleged wrongdoers were, in fact, employees or agents of the government, nor has Black asserted that he can present a prima facie case even if the information were determined to be privileged. 11/

10/ Under Minnesota law, the tort of intentional infliction of emotional distress requires the plaintiff to prove that the defendant intentionally or recklessly engaged in extreme and outrageous conduct which caused the plaintiff to suffer severe emotional distress. See Hubbard v. UPI, 330 N.W.2d 428, 438-39 (Minn. 1983).

11/ Black did cite to the Court decisions

Second, and more importantly, dismissal is warranted because the factual allegations in the Amended Complaint are so tied to the privileged information that further litigation will constitute an undue threat that privileged information will be disclosed. In his Amended Complaint, Black alleges numerous contacts with agents of the government, including the CIA, throughout 1987 and early 1988, the genesis of which was his contact with a Soviet mathematician during a 1986 teaching assignment in Switzerland. Amended Complaint, Paragraphs 14-20. Black

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in which the litigation continued despite the privilege, including cases in which the court conducted an in camera trial. After reviewing those decisions, the Court concludes that an in camera trial is not a reasonable alternative in this case.

further alleges that the harassment and "psychological attacks" constituting intentional infliction of emotional distress commenced after he returned from Switzerland in October 1987 and failed to contact the government officials with whom he had been dealing. Id. paragraph 21. These portions of the Amended Complaint demonstrate that litigating Black's FTCA claim necessarily will involve attempts to prove an ongoing series of contacts between Black and government agents, the exact information that has been determined to be privileged. As a result, no measure of security or diligence could ensure that information falling within the privilege will not be disclosed; in such circumstances, dismissal is warranted.

See Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 281, 281 (4th Cir. 1980) (en banc), prior panel decision, 635 F.2d 268 (4th Cir.). 12/

D. Black's Bivens Claim

In Count II, Black alleges that certain agents 13/ of the State

12/ Black contests the hardship and unfairness that is worked by upholding the state secrets privilege in this case and dismissing his FTCA claim; however, as the Fourth Circuit stated in Fitzgerald:

> When the state secrets privilege is validly asserted, the result is unfairness to individual litigants--through the loss of important evidence or dismissal of a case -- in order to protect a greater public value....[w]here, as here, the very question upon which the case turns is itself a state secret, the litigant will often find himself without a forum to redress his grievances. The burden of protection of a public value falls upon him alone.

776 F.2d at 1238-39 n.3.

13/ The individual defendants are "Olin

Department, CIA, and FBI violated his constitutional rights under the Fourth Amendment and that they are liable for injuries arising from these violations. The United States is not a named defendant in Count II and the instant motion does not seek dismissal of Count II. Accordingly, as to Count II, the United States is invoking the state secrets privilege as a non-party.

The procedural posture of Count II notwithstanding, the court concludes that Black's Bivens claim must be dismissed. In circumstances where the privilege is upheld, dismissal may be appropriate even

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Peter Nielson" and John or Jane Does one through ten, unknown officials of the CIA, FBI, the Department of Defense and the Department of State. Amended Complaint, paragraph 1. The United States admits that Olin Peter Nielson is an alias for a former employee of the CIA. Answer, paragraph 6.

though the government is not a named party to the cause of action. See Fitzgerald v. Penthouse, Int'l, Ltd., 776 F.2d 1236, 1241-42 (4th Cir. 1985); Farnsworth Cannon, 635 F.2d at 281. In this case, Black's Bivens claim is based on allegations that his Fourth Amendment rights were violated by government agents and that the violations occurred as a result of his intelligence contacts with the CIA and FBI, i.e., his contacts with government agents precipitated the violations. 14/ Given this factual

14/ A Bivens claim seeks damages from "federal officials" where those officials violate "clearly established constitutional rights." Arcoren v. Peters, 811 F.2d 392, 393 (8th Cir.), vacated on other grounds, 829 F.2d 671 (8th Cir. 1987) (en banc), cert. denied, 485 U.S. 987 (1988). Accordingly, the plaintiff in a Bivens action must allege and establish that (1) the alleged wrongdoers were, in fact, federal agents,

premise, information concerning the identity of the alleged wrongdoers, their relationship to the government, and their contacts with Black are essential to his Bivens claim. As that information falls within the scope of the state secrets privilege upheld herein, litigating Black's Bivens claims will present a continuing and substantial threat that privileged information will be disclosed. See supra Part II.B. Moreover, Black's inability to acquire information concerning (a) the identity of the alleged wrongdoers, and (b) the nature of their actions, precludes him from establishing a prima facie case of

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and (2) they took actions that violated the plaintiff's constitutional rights.

liability on his Bivens action. 15/

Conclusion

Based upon the foregoing, and the records, files and proceedings herein, including the briefs and arguments of counsel, IT IS ORDERED that the defendant United States of America's Motion for Judgment on the Pleadings (Doc. No. 62) is GRANTED. Plaintiff William C. Black Jr.'s claims against the defendants, as set out in Counts I and II of the Amended Complaint, are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

15/ Dismissal is also appropriate under Fed. R. Civ. P. 12(b)(5) because the identities of the individual defendants are privileged; as a result, Black has not and cannot perfect service on those defendants.

Dated: April 18, 1994

RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

William C. Black, Jr.,

Plaintiff,

vs.

United States of America et al.,

Defendants.

CV 3-92-628

Memorandum Opinion and ORDER

William C. Black, Jr. Golden Valley, Minnesota, pro se.

Matthew T. Fricker, U.S. Department of Justice, Torts Branch, Civil Division, and Thomas E. Goodreid, Office of General Counsel, Central Intelligence Agency, Washington, D.C. for defendant United States.

Introduction

This matter is before the Court on the United States' Motion to Dismiss pursuant to Federal Rules of Civil

Procedures 12(b)(1) and 12(b)(6). 1/ The grounds for the motion are that plaintiff William C. Black, Jr.'s ("plaintiff") various claims are barred by the operation of 28 U.S.C. Section 2675, 28 U.S.C. Section 2680(h) and (k) or 28 U.S.C. Section 2401(b) and that plaintiff's claims of negligence and intentional infliction of emotional distress fail to state claims under the law of Minnesota, thus depriving the Court of subject matter jurisdiction under 28 U.S.C. Section 1346(b).

Background

Plaintiff alleges that the following

1/ In response to the United States' Motion, plaintiff has submitted material outside the pleadings. Pursuant to Rule 12(b), the Court may convert the motion to a Rule 56 motion for summary judgment. However, the court declines to do so and will not consider material not properly before the Court on a motion to dismiss.

circumstances, events and conversations occurred, beginning in 1986: Plaintiff is an electrical engineer and has worked in the area of integrated circuit designs since 1978. In the early 1980's, he began performing contract work regarding certain military-related projects for several companies, including Hughes Aircraft and Honeywell's Defense Systems Division. In connection with his work for Hughes and Honeywell, plaintiff received a Department of Defense security clearance. This security clearance expired in August, 1987, due to inactivity.

In November, 1986, while his security clearance was still current, plaintiff began teaching technical short courses at the Swiss Federal Institute of

Technology in Zurich, and while there, had contact with a Soviet mathematician whom plaintiff felt asked him intrusive and suspicious questions. Plaintiff reported these questions to the U.S. Consulate, and subsequently met with Lynn Levenson, an economic officer stationed at the U.S. Embassy in Bern, regarding his contact with the Soviet mathematician. Plaintiff met with Levenson several times on his next visit to Switzerland in April, 1987, at her request.

In January, 1987, after plaintiff returned to the United States, he was contacted by Olin Peter Nielson, who identified himself as a CIA employee. 2/

2/ The United States had acknowledged that this name, Olin Peter Nielson, is an alias. Memorandum of Law in Support of Motion, n. 1

Nielson questioned plaintiff about his contact with the Soviet mathematician. Plaintiff alleges that Nielson instructed plaintiff to contact him about any plans plaintiff had to travel abroad. Nielson did not specifically ask plaintiff to be an informant, but plaintiff cooperated with Nielson's requests for information because he thought he was obligated to do so as he was still covered by a security clearance.

Nielson continued to contact plaintiff regarding the Institute in Zurich and the Soviet mathematician, and plaintiff claims that Nielson even contacted him at his father's house in Iowa when plaintiff had told no one of his plans to be in Iowa. After his security clearance expired in August,

1987, plaintiff decided not to report any information to Nielson or Levenson about his connection with the Institute or the Soviet mathematician.

In October, 1987, plaintiff alleges that he became the "subject of a campaign of harassment and psychological attacks." Complaint, Paragraph 21. This "campaign" consisted of persons entering plaintiff's apartment and car and rearranging items; planting bugging devices in the form of filaments sewn into his carpet; creating the sound of rolling dice emanating from a nearby apartment; making strange telephone calls to plaintiff; setting off false fire alarms; spraying his furniture with a substance which caused plaintiff to suffer hallucinations upon contact; causing an elderly couple to follow him;

and making deposits in one of his brokerage accounts in the amount of his hospital bill. Plaintiff alleges that such "harassment" continued until early 1990.

In February, 1988, plaintiff met with Nielson and three other individuals who were associated with the CIA. Plaintiff claims he recognized one of these individuals as someone who had followed him in Zurich, and he confronted Nielson about this. Nielson allegedly told him to keep any conversations plaintiff had with Nielson confidential. Plaintiff understood some of Nielson's comments to be veiled threats against him.

Plaintiff alleges that he suffered extreme anxiety, emotional distress, and

physical illness as a result of defendants' action. He entered the mental health ward of a hospital on April 19, 1988 and was released on May 4, 1988.

In early 1989, plaintiff filed Freedom of Information Act requests with the CIA, the FBI and the Department of State. Over the course of the following months, plaintiff received some information from his files, but was also denied access to certain material. In January of 1990, plaintiff requested Senator Dave Durenberger to inquire into the U.S. intelligence activities against him from 1986 to the present. Plaintiff claims that two days after making this request, his office was broken into.

Although the complaint does not so indicate, plaintiff filed administrative

claims with the CIA and the FBI on January 6, 1990, making allegations similar to those made in the Complaint in this matter. The CIA denied his claim on March 17, 1992.

Plaintiff commenced this action on September 15, 1992 against the United States, the CIA, the FBI, and individual defendant Nielson and ten John and Jane Does, alleged to be employees of the CIA, FBI, Department of State and Department of Defense. 3/ In Count I of the Complaint, plaintiff alleges negligence under the Federal Tort Claims Act ("FTCA") by the breach of a duty of care owed by defendants to plaintiff in

3/ The Court notes that the United States is the proper defendant with respect to named agencies. 28 U.S.C. Section 2679(a). See Loeffler v. Tisch, 806 F.2d 817, 820 (8th Cir. 1986) (en banc).

connection with his security clearance and participation in intelligence activities and as an unwilling subject of experimental research concerning psychological harassment. Count II alleges, pursuant to the FTCA, assault and battery by investigative or law enforcement officers from the CIA, FBI, Department of Defense and Department of State. Count III, also an FTCA claim, alleges intentional infliction of emotional distress. Count IV alleges violation of plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures. Plaintiff seeks compensatory and consequential damages in the amount of $5,000,000, punitive damages and declaratory relief.

The United States moves for

dismissal on Counts I, II and III, but not on Count IV.

Discussion

I. STANDARD FOR DISMISSAL UNDER RULE 12(b)(6)

Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. Spalding & King, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984). "Dismissal is appropriate 'as a practical matter...only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some unsuperable bar to relief.'" Ring v. First Interstate Mortgage, Inc., slip op. No. 92-1019 (8th Cir. January 28, 1993

(citing Bramlet v. Wilson, 495 F.2D 714, 716 (8th Cir. 1974)). When considering a motion to dismiss, a district court "must accept plaintiffs' well-pleaded allegations as true and construe the complaint an[d] inferences reasonably drawn from it in favor of the plaintiff." Wells v. Walker, 852 F.2d 368, 370 (8th Cir. 1988), cert. denied, 489 U.S. 1012 (1989). "Rule 12(b)(6) does not countenance...dismissals based on a judge's disbelief of a complaint's factual allegations" (Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 1832 (1988)) and "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S.

232, 236 94 S.Ct. 1683, 1686 (1974).

In this case, the United States asserts that plaintiff has failed to allege with sufficient facts any connection between the contact plaintiff had with government officials and the alleged tortious acts which plaintiff claims are the cause of his injuries. Furthermore, the United States asserts that it is unreasonable to draw the inference that CIA employees knowingly violated the law by engaging in the alleged campaign of psychological harassment because Executive Order 12333 expressly forbids agents of the CIA from engaging in any domestic electronic or physical surveillance or unconsented physical searches. Executive Order 12333 at Section 2.4 (Dec. 4, 1981), reprinted

in 50 U.S.C. Section 401 note.

The Court disagrees, and concludes that plaintiff's Complaint alleges adequate factual allegations with respect to the participation of members of the CIA and the FBI. 4/ The court rejects the United States argument with respect to the Executive Order's prohibition on CIA involvement in domestic surveillance as assuming that which is to be proved. The Court notes plaintiff's allegations of a campaign of psychological harassment and other covert actions involve facts and

4/ Plaintiff's allegations with respect to the Department of Defense and Department of State and their officers and employees are barred for failure to exhaust the administrative remedies. See infra Section II. Therefore, this Memorandum Opinion will address only the actions and conduct alleged in the Complaint to the extent they involve the CIA and the FBI and their employees.

circumstances which are inherently difficult to prove, and which plaintiff may ultimately be unable to prove to a reasonable jury. However, the overall sufficiency of the allegations leads the Court to conclude that the United States is not entitled to dismissal for failure to state a claim based on the failure to allege a connection between the contact with government officials and the alleged tortious conduct.

However, the United States has also asserted several other grounds for dismissal: it asserts that Counts I and III of plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction and failure to state an actionable claim insofar as the allegations of negligence in Count I and

of intentional infliction of emotional distress in Count III fail to state claims for which Minnesota law provides a remedy. The United States also asserts that because plaintiff has not alleged that the persons allegedly committing the assault and battery were "investigative or law enforcement officers," his claims of assault and battery in Count II are barred by 28 U.S.C. Section 2680(h), thus depriving the Court of jurisdiction under 28 U.S.C. Section 1346(b). In addition, the United States argues that claims of tortious acts allegedly committed by Department of State officials abroad are barred by 28 U.S.C. Section 2680(k). Each of these arguments will be addressed in turn.

A. Availability of Remedy for Counts I and III under Minnesota

Law

Under the FTCA, the district court has jurisdiction over claims against the United States for injury

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Section 1346(b) (emphasis added). In this case, the alleged negligent or wrongful acts occurred in Minnesota, and in order for this Court to have subject matter jurisdiction, plaintiff must establish that a private person would be liable to plaintiff for similar actions under Minnesota law. See Butts Feed Lots, Inc. v. United States, 690 F.2d 669, 670 (8th Cir. 1982) ("We

note at the outset that the burden of establishing jurisdiction lies with [the plaintiff]").

1. Count I - Negligence

Plaintiff rests his negligence claims on an alleged breach of duty owed to him by defendants "in connection with the issuance, training and handling of federal agency security clearances...and in connection with plaintiff's participation as an informant and intelligence agent for the federal government." Complaint, Paragraph 40. Plaintiff also asserts that defendants breached a duty of care owed to him "to obtain his informed consent before using him as an informant or as a subject of experimental research... [and] in connection with [the United States'] use

of physical and electronic surveillance, its methods of collection information from him, and its use of dangerous psychological methods and chemicals." Complaint, Paragraph 41.

Plaintiff argues that two Minnesota statutes, Minn. Stat. Section 144.651(13) and (14) and Minn. Stat. Section 609.43, impose the requisite duty of care on the defendants, which, if the United States were a private person, would provide plaintiff a remedy. However, neither statute applies to a person in plaintiff's circumstance - Minn. Stat. Section 144.651 5/ applies only to

5/ Minn. Stat. Section 144.651, subd. 9 provides in relevant part:

> Patients and residents shall be given by their physicians complete and current information concerning their diagnosis, treatment, alternatives, risks and prognosis as

"patients and residents of health care facilities." Minn. Stat. Section 144.651(1). Thus, even if the United States were a private person in Minnesota, plaintiff could not sue for breach of duty of care under this statute.

Likewise, Minn. Stat. Section 609.43 6/ does not create a private right of

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required by the physician's legal duty to disclose...This information shall include the likely medical or major psychological results of treatment and its alternatives...

Subdivision 13 of the same section provides:

Written, informed consent must be obtained prior to a patient's or resident's participation in experimental research. Patients and residents have the right to refuse participation. Both consent and refusal shall be documented in the individual's care record.

6/ Minn. Stat. Section 609.43 provides:

A public officer or employee who does any of the following...may be

action against public officials who act without lawful authority. 7/ The

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sentenced to imprisonment...or to payment of a fine...:

(1) Intentionally fails or refuses to perform a known mandatory, nondiscriminatory, ministerial duty of the office or employment within the time or in the manner required by law; or

(2) In the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity; or

(3) Under pretense or color of official authority intentionally and unlawfully injures another in the other's person, property, or rights...

7/ Plaintiff's assertion that the "public officer or employee" referred to in Minn. Stat. Section 609.43 should be considered a "private person" for purposes of the private liability requirement in 28 U.S.C. Section 1346(b) is misplaced. The test is whether, if the United States were a private person, plaintiff would have a cause of action under state law, not whether, if the state laws applicable to public officials were applied to the United States, plaintiff would have a cause of action.

criminal code does not give rise to a duty owed by public officials to plaintiff on an individual basis as the code imposes only a general duty owed to the entire public. See Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979). Cf. Ayala v. United States, 771 F. Supp. 1097, 1109-10 (D. Colo. 1991) (no civil remedy under state law for violation of federal regulations and the district court had no jurisdiction to hear FTCA claim).

Likewise, Minnesota common law does not support the imposition of a duty of care owed by defendants to plaintiff with respect to security clearances and experimental research. Absent a specific duty imposed by statute, the existence of a duty of care generally depends on the

relationship between the parties such that one party has superior capabilities or resources to protect the other or voluntarily assumes the responsibility to protect. See generally 13B Dunnell Minn. Digest 2d Negligence Sections 2.01-2.03 (3d ed. 1981). Traditional relationships imposing a duty of care include landlord and tenant with respect to common areas and concealed defects (see, e.g., Sjodin v. Lund, 152 N.W.2d 718 (Minn. 1967) and Johnson v. Miller, 388 N.W.2d 26 (Minn. Ct. App. 1986)); storekeeper and customer (Block v. Target Stores Inc., 458 N.W.2d 705 (Minn. Ct. App. 1990); relationships with children (see, e.g., Jam v. Independent School District No. 709, 413 N.W.2d 165 (Minn. Ct. App. 1987); and relationships with elderly or handicapped

persons (see, e.g., Thelen By and Through Thelen v. St. Cloud Hosp., 379 N.W.2d 189 (Minn. Ct. App. 1985). There is also a general duty to protect persons taken into one's custody. Hille v. Wright County, 400 N.W.2d 744 (Minn. Ct. App. 1987). Plaintiff has not established that issuance of a security clearance, using an informant, or conducting alleged experimental research creates such a duty on a private person under Minnesota law. 8/ Therefore, plaintiff has failed to

8/ The Court notes that while the issuance of security clearances and the use of informants in international surveillance are "uniquely governmental" functions, this alone does not entitle the United States to immunity under the FTCA for alleged negligence in conducting such actions. The Court focuses on the behavior involved, as opposed to labels categorizing such behavior as "governmental functions," when looking for analogies with private conduct under state. Compare Arvanis v. Noslo Engineering Consultants, Inc., 739 F.2d

establish subject matter jurisdiction, and the United States is entitled to dismissal of Count I pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. 9/

1287, 1290 (7th Cir. 1984) with C.P. Chemical v. United States, 810 F.2d 34, 37 (2d Cir. 1987) ("Thus, as to certain governmental functions, the United States cannot be held liable, for no private analog exists.") See Wells v. United States, 851 F.2d 1471, 1473-74 (D.C. Cir. 1988) for an extensive discussion of inadequate judicial analysis of the FTCA's private liability requirement and of the United States' misplaced reliance on the argument that it is immune from liability when it engages in activities that have no analogy in the private sector.

In this case, however, the Court finds that no state statutory or common law imposes a duty of care on a private person issuing security clearances, using an informant or conducting experimental research outside a hospital, even assuming private persons do engage in such activities.

9/ Although plaintiff does not have a cause of action under Minnesota law, the Court notes that his constitutional claim in Count IV is not dependent on state

2. Count III - Intentional Infliction of Emotional Distress

Under Minnesota law, the tort of intentional infliction of emotional distress has four elements:

(1) the conduct must be extreme and outrageous;

(2) the conduct must be intentional or reckless;

(3) it must cause emotional distress; and

(4) the distress must be severe.

Hubbard v. UPI, Inc., 330 N.W.2d 428,

law. "[A] federal officer's conduct may offend the Constitution and therefore subject him to liability in a Bivens action, while the law of the state in which the tort occurred may not effect any relief and therefore preclude an FTCA action against the United States." Ting v. United States, 927 F.2d 1504, 1513 (9th Cir. 1991) (discussing the different standards for FTCA and Bivens actions).

438-39 (Minn. 1983). The Complaint alleges that actions described in the Complaint were "intentional, willful, or reckless" (Complaint, Paragraph 50). The United States argues that plaintiff cannot establish that its alleged conduct was "intentional or reckless" insofar as plaintiff has not established that, in fact, agents of the FBI or CIA actually engaged in the conduct alleged. That is, without the link between the conduct alleged and the defendants, the United States asserts that plaintiff has not made out a necessary element of his intentional infliction of emotional distress claim under Minnesota law, thus depriving this Court of jurisdiction.

As discussed above, the Court finds that plaintiff's Complaint is not legally

insufficient with respect to the allegations of a connection between plaintiff's contact with government officials and the alleged tortious acts. Therefore, plaintiff has stated a claim for relief under Minnesota law for intentional infliction of emotional distress. The fact that plaintiff may not ultimately prevail on the element of intentional or reckless conduct does not mean that he has failed to state a claim under Minnesota law so as to deprive this Court of subject matter jurisdiction. The United States is not entitled to dismissal of Count III.

D. Count II - Allegations of Assault and Battery by "Investigative or Law Enforcement Officers"

The provisions of the FTCA do not apply to

> [a]ny claim arising out of assault, battery,...: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising...out of assault, battery... For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. Section 2680(h) (emphasis added). Thus, if an investigative or law enforcement officer engages in acts of assault and battery, the United States has consented to be sued in district court. In this case, plaintiff alleges that employees or agents of the FBI, CIA, Department of Defense and Department of State committed assault and battery against him by attempting to inflict mental and physical injury on him under

circumstances which gave rise to a reasonable apprehension of injury. Complaint, Paragraph 46.

Of the agencies alleged to have participated in the assault and battery, only the FBI employs "investigative or law enforcement officers" as defined by the FTCA. Plaintiff has submitted the affidavit of Louis Wolf in support of his allegation that the agents of the CIA are "investigative or law enforcement officers," but the organic statute of the CIA specifically provides that the CIA does not have law enforcement powers. 50 U.S.C. Section 403(d)(3). Furthermore, Executive Order 12333 prohibits the CIA from engaging in electronic surveillance or unconsented searches in the United States. Ex. Order 12333 at Section 2.4

(Dec. 4, 1981), reprinted in 50 U.S.C. Section 401. Thus, the CIA employees are not law enforcement officers "empowered by law" as required of such officers in the FTCA.

Plaintiff cannot establish that officials of the CIA are "investigative or law enforcement officers"; therefore, the intentional tort exception does not apply to their actions and plaintiff is barred from asserting a cause of action alleging assault and battery against them. 28 U.S.C. Section 2680(h). However, the United States concedes that officers of the FBI are "investigative or law enforcement officers"; therefore, the proviso to the intentional tort exception does apply to them, and plaintiff may maintain a cause of action against the

United States alleging assault and battery by FBI officers.

E. Counts II and III - Allegations of Tortious Conduct Abroad

The FTCA specifically excludes from operation of the Act "[a]ny claim arising in a foreign country" (28 U.S.C. Section 2680(k)), thus barring recovery for any allegedly wrongful act which takes place abroad. A claim "arises" at the location where the alleged negligent act occurred that proximately caused the injury. See Sami v. United States, 617 F.2d 755, 761 (D.C. Cir. 1979).

In this case, plaintiff's first contact with government agents or employees occurred in Switzerland. While the United States acknowledges that the alleged acts of harassment all occurred in the United States, it argues that to

the extent that plaintiff's claims rely on acts taken in Switzerland, they are barred by the "foreign country" exception. The Court rejects this argument as an unwarranted expansion of the definition of "arising" under the FTCA, particularly with respect to proximate causation. The contacts which occurred in Switzerland are part of the circumstances which led to the alleged "campaign of harassment," but plaintiff does not allege that the contact itself caused his injury. Plaintiff's claim did not arise in Switzerland - the predicate events giving rise to his claim merely took place there. The Court concludes that section 2680(k) does not bar any of the plaintiff's claims.

II. STATUTE OF LIMITATIONS FOR COUNTS I

AND II

Under the FTCA, an action against the United States must be brought within two years of the alleged wrongful conduct. 28 U.S.C. Section 2401(b). In addition, a plaintiff must present his complaint to the agency or official for administrative review before he can file a complaint in federal district court. 28 U.S.C. Section 2675. In this case, plaintiff failed to seek administrative review from the Department of State or the Department of Defense, and is therefore barred from proceeding in district court with his claims against the United States predicated on the actions of those agencies or their employees. 28 U.S.C. Section 2675.

Plaintiff filed complaints with the

FBI and the CIA on January 6, 192. The two year statute of limitations runs back from that date; therefore, plaintiff must establish that the United States engaged in the alleged wrongful acts on or after January 6, 1990 in order to fall within the limitations period. As the Court has determined that plaintiff has failed to state a claim upon which relief can be granted with respect to Count I (negligence), it is not necessary to address the statute of limitations issued as to that claim, and will address it only as to the assault and battery claim in Count II.

Plaintiff's Complaint alleges only one specific action which he believes to be part of the alleged campaign of psychological harassment which took place

after January 6, 1990 - he alleges that his office was broken into on January 24, 1990. Complaint, Paragraph 35. Such an act does not constitute an "assault" or "battery" within the meaning of Minnesota law. Even if the Court considers plaintiff's Declaration, a document outside the pleading, plaintiff has failed to allege an act of "assault" or "battery" after January 6, 1990. None of the acts alleged to have taken place after January 6, 1990 constitutes "assault" or "battery" within the definitions applied in Minnesota law. An "assault" is an unlawful threat to do bodily harm to another with the present ability to carry the threat into effect. Dahlin v. Fraser, 288 N.W. 851 (Minn. 1939). A "battery" is intentional,

unpermitted, offensive bodily contact with another. Wirig v. Kinney Shoe Corp., 448 N.W.2d 526 (Minn. Ct. App. 1989), aff'd in part, rev'd in part on different grounds, 461 N.W.2d 374 (1990). Plaintiff alleges that the United States wrongfully entered his home and garage and continued harassing him with phone calls. None of these acts threatens injury or results in unwanted bodily contact; therefore plaintiff has not alleged the existence of any act of assault and battery within the limitations period, and Count II is barred.

Plaintiff argues that the theory of "continuing tort" applies to the alleged campaign of psychological harassment. See Wehrman v. United States, 830 F.2d

1480 (8th Cir. 1987); Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982). While the application of this theory allows plaintiff to maintain his claim of intentional infliction of emotional distress (Count III) 10/ as the

10/ The United States did not assert that plaintiff's claim of intentional infliction of emotional distress was barred by the statute of limitations in its moving papers or in its reply brief. However, at oral argument, the United States argued that this claim was barred for the same reasons as the negligence and assault and battery claims - namely that the Complaint fails to allege acts occurring within the two years before January 6, 1992, the date plaintiff filed his administrative claim. The United States argued that the "continuing tort" theory does not apply because each of the tortious acts alleged are discreet torts, giving rise to a separate statute of limitations for each one. The Court concludes, however, that the tort of intentional infliction of emotional distress is a "continuing tort" on the facts of this case, and that because plaintiff has specifically alleged at least one act within the statutory period, his claim is not barred. Evidence of other tortious acts which

acts alleged to have taken place after January, 1990 are acts which may contribute to plaintiff's emotional distress, it does not encompass discreet acts of assault and battery outside the limitations period. While the alleged assault and battery may have contributed to plaintiff's emotional distress, they cannot be the subject of a separate claim when they occurred outside the

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plaintiff alleges took place before January 6, 1990 is relevant to the extent such evidence relates to the "extreme and outrageous" nature of defendants' alleged conduct, a necessary element of an intentional infliction of emotional distress claim; to plaintiff's alleged injuries; and to plaintiff's damages, if any.

On the suggestion of the United States in its Reply Memorandum, the Court will direct plaintiff to amend his Complaint to allege any tortious acts which occurred after January of 1990 and which plaintiff claims contributed to his injuries.

limitations period. The statute of limitations creates an "insuperable bar to relief" on plaintiff' claims of assault and battery in Count II, and the United States' motion to dismiss shall be granted with respect to Count II.

Order

Based on the files, records and proceedings herein, IT IS ORDERED that

1. The United States' Motion to Dismiss (Doc. No. 7) is GRANTED with respect to Counts I and II of plaintiff's Complaint, and DENIED with respect to Count III; and

2. Plaintiff is directed to file forthwith an Amended Complaint with respect to Count III to allege certain facts as discussed in the foregoing memorandum, at note 10.

Dated: April 2, 1993

RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

WILLIAM C. BLACK, Jr., Ph.D. 400 Janalyn Circle Golden Valley, MN 55416 Plaintiff, v. UNITED STATES OF AMERICA, Serve: Mr. Gordon W. Daiger Mr. Mathew T. Fricker U.S. Department of Justice Washington, D.C. OLIN PETER NIELSON, JOHN OR JANE DOES ONE THROUGH TEN, UNKNOWN OFFICIALS OF THE CENTRAL INTELLIGENCE AGENCY, FEDERAL BUREAU OF INVESTIGATION, THE DEPARTMENT OF DEFENSE, AND THE DEPARTMENT OF STATE Defendants.	No. 3-92 Civil 628 (RHK)

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES AND JURY DEMAND

Preliminary Statement

1. This is a first amended complaint against the United States of America for intentional infliction of emotional distress, in violation of the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b) and 2671 et seq. This is also an action against Olin Peter Nielson and unnamed individuals, John or Jane Does One Through Ten, Unknown Officials of the Central Intelligence Agency, the Federal Bureau of Investigation and the Department of State for declaratory judgment and monetary damages for deprivations of the rights, privileges and immunities secured by the Constitution of the United States and, in particular, those secured by the Fourth Amendment.

Jurisdiction and Venue

2. This court has subject matter jurisdiction over plaintiff's claims pursuant to 28 U.S.C. Sections 1331, 1332, 1343(a)(3), 1346(b), and 28 U.S.C. Section 2401(b). This action is filed under the Fourth Amendment of the Constitution of the United States to redress injuries suffered by plaintiff for deprivations of rights secured by the Fourth Amendment to the United States Constitution. Declaratory relief is sought pursuant to 28 U.S.C. Sections 2201 and 2202.

3. Venue is appropriate under 28 U.S.C. Sections 1391 and 1402(b).

Parties

4. Plaintiff William C. Black, Jr., Ph.D., is a resident of the State of Minnesota, and resides at 400 Janalyn

Circle, Golden Valley, Minnesota 55416.

5. Defendant United States of America, through the Federal Tort Claims Act, 28 U.S.C. Sections 1346(g), 2401(b), and 2671 et seq. is responsible to injured persons for the common law torts of employees of federal agencies, including the Central Intelligence Agency ("CIA") and the Federal Bureau of Investigations ("FBI"). The CIA and the FBI, are federal agencies, within the meaning of the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq. At all times relevant to this complaint, employees of the CIA and the FBI who interacted with plaintiff were acting within the scope of their office or employment.

6. Defendant Olin Peter Nielson is

a person employed by the CIA. At all times relevant to this complaint, he was authorized to act on behalf of the CIA.

7. John or Jane Does One Through Ten are unknown employees of the CIA, FBI and the Department of State. At all times relevant to this complaint, John and Jane Does One Through Ten were authorized to act on behalf of their agencies and the United States.

Factual Allegations

8. Plaintiff received a Ph.D. in electrical engineering from the University of California at Berkeley in 1980. Since 1978, plaintiff has worked as a consultant in the field of integrated circuit design either individually or since 1987, as an employee of Northern Microdesign, Inc., a

Minnesota Corporation wholly owned by plaintiff.

9. Prior to 1987, plaintiff's clients had been primarily commercial electronics firms, which designed chips for telecommunications, memory, and consumer electronics applications. In addition, plaintiff had contracted to perform military-related work with firms such has Hughes Aircraft, Sandia Laboratories, and Honeywell's Defense Systems Division. These military contracts included work on signal processing for torpedoes and other "smart" devices.

10. In connection with his military contracts, plaintiff received a Q security clearance from the Department of Energy ("DOE") and a "Secret" security

clearance from the DOD. However, plaintiff never worked on classified matters, and never read or produced classified documents. In 1981, Dr. Black received a DOD "secret" clearance in connection with military-related contracting work at Hughes Aircraft and subsequently at Honeywell. The DOD clearance expired because of inactivity in August, 1987.

11. In 1984, plaintiff began teaching technical short courses on integrated circuit design in the United States, Europe, and Asia. In November, 1986, plaintiff lectured on integrated circuit design at the Swiss Federal Institute of Technology in Zurich. During his three week visit there, plaintiff shared an office with a Soviet

mathematician who specialized in data coding and data encryption.

12. The mathematician asked plaintiff intrusive questions about his personal life and business, including about the security of his office at home, and repeatedly asked to see plaintiff's airplane ticket.

13. In November, 1986, plaintiff held a DOD "secret" clearance. During a briefing about the clearance, plaintiff was told that he was required to report any suspicious, foreign contacts. Because of his concerns and his perceived duty under his security clearance, plaintiff reported his contact with the Soviet mathematician to the United States Consulate in Zurich. The Consulate arranged for him to meet with Lynn A.

Levenson, an 'economic officer' stationed at the embassy in Bern. Plaintiff told Levenson about his contacts with the Soviet mathematician. During his next visit to Switzerland, plaintiff met with Levenson numerous times at her request.

14. In early January, 1987, after returning to his home in Minnesota, defendant Olin Peter Nielson, who identified himself as a representative of the U.S. government, requested a meeting with plaintiff. At the first meeting, Nielson identified himself as a CIA employee, questioned plaintiff about both Eastern Bloc and American colleagues at the Institute, and about plaintiff's future travel plans. Nielson instructed plaintiff to contact Nielson if there were any changes in his travel plans, and

to respond to persons abroad who approached him and described themselves as "friends of Peter". "Nielson" is an alias for a CIA official, employee, or contract employee.

15. Nielson never requested plaintiff to serve voluntarily as an informant, and plaintiff never consented to be an informant. Plaintiff cooperated with Nielson's instructions because he believed that he was legally obligated to do so.

16. In April, 1987, Dr. Black returned to the Institute to lecture and perform research for a period of three months. At Nielson's direction, plaintiff called Levenson, who requested a meeting in Zurich. At this meeting and four subsequent meetings, Levenson

questioned plaintiff about what he was doing and whom he was seeing, and requested information about the Institute, including funding levels and research topics, and plaintiff's American colleagues.

17. On July 16, 1987, Dr. Black returned from Switzerland by way of Iowa, where he visited his father. Although he never told Nielson that he was going to Iowa, plaintiff received a telephone call there from Nielson who advised him that there were people from Washington who wanted to talk to him and that it was quite important. Plaintiff cut his trip short and returned to Minnesota.

18. On or around July 23, 1987, plaintiff met with Nielson and two other individuals who told him they were

employees of the CIA. They discussed the work that plaintiff was performing at the Institute, and the Soviet mathematician whom Dr. Black had met previously. They also discussed a second Soviet scientist who he believed might attend the Institute in the Fall of 1987, when plaintiff was planning a return visit.

19. In August, 1987, plaintiff's DOD security clearance with Honeywell expired because of "inactivity". Thereafter, plaintiff believed that he was no longer under an obligation to cooperate with CIA demands for information.

20. In September, 1987, plaintiff delivered a technical short course in the Hague and returned to Zurich for a two week visit to the Institute. Plaintiff did not report any information from his

visit to Nielson or to any of the other people who had identified themselves as associated with the CIA.

21. Upon returning home in October, 1987, and after failing to contact Nielson or any other government official, plaintiff became the subject of a campaign of harassment and psychological attacks. Upon information and belief, this campaign was directed by the CIA and FBI, and by unknown employees of the CIA, the FBI and the Department of State. As part of this campaign, and without plaintiff's consent, defendants repeatedly entered plaintiff's apartment in his absence and moved or rearranged personal items. Further, patterns of sloppy, monofilament stitching appeared several times in plaintiff's living room

carpet shortly after a colleague mentioned that 'bugging devices' are easily sewn into carpet and furniture.

22. In or around October, 1987, loud sounds of shaking and rolling dice began emanating from the apartment of a neighbor who had recently moved in. Although these sounds were loud enough to be audible in his apartment, they only occurred when plaintiff came or went from his apartment. On numerous occasions plaintiff received strange telephone calls, and false fire alarms also began occurring, typically in the early morning hours. On several occasions, plaintiff was overtly followed.

23. This campaign of harassment and psychological attacks caused plaintiff extreme stress and anxiety, and physical

ailments, including a painful colon disorder, nausea, diarrhea, and an uncontrollable facial tick. In January, 1988, plaintiff sought psychiatric treatment for the first time in his life.

24. On or about January 1, 1988, plaintiff's father informed him that he had received a visit from government officials. Plaintiff immediately wrote a letter to Nielson to advise him that persons, apparently from the CIA, had visited his father and to inquire as to why these contacts occurred. On or about January 7, 1988, in response to plaintiff's letter, Nielson telephoned plaintiff, denied CIA involvement, and stated that it "must have been the other side" that visited his father.

25. On or about mid January 1988,

Nielson called plaintiff and requested that he meet with "a few other people." Because plaintiff feared that there would be serious consequences for him if he refused to comply with Nielson's request, on February 4, 1988, plaintiff met with Nielson and three other individuals. Two of the individuals were described as being from Washington D.C., while the third subsequently was described as a "field" man. These persons spent several hours talking with plaintiff, and referred to "this case" without ever specifying what the case concerned. At the end of this meeting, Nielson talked about the CIA's role of enforcement, and how the CIA's "enforcement" role "got in the way" of its distinct role of collecting information. Plaintiff

perceived Nielson's remarks about the CIA's enforcement activities as a veiled threat against him if he were to disclose the CIA's activities.

26. Following this meeting, plaintiff recognized that the "field" man in the February 4, 1988 meeting had attended one of his courses in Switzerland and had followed him and Ms. Levenson out of a restaurant in Zurich the previous summer. Thereafter, plaintiff called Nielson and asked him why this CIA "field man" had monitored his activities in Zurich. Nielson stated that he knew nothing about these activities and warned plaintiff that the conversations that he previously had with them were confidential. He further stated, "Not even all the people here

know about this." In response, plaintiff stated that he wished to see his CIA file, to which Nielson responded, "You can see exactly what you have contributed."

27. On or about February 29, 1988, Nielson called plaintiff and stated that there would be no more "direct contact" with him. Nielson hung up after stating, in a satiric tone, "have a pleasant trip," referring to his planned return to Zurich. Plaintiff understood the comment to be another veiled threat and act of psychological harassment.

28. Following this conversation, the harassment and psychological attacks against plaintiff resumed after the short hiatus. On or about March 16, 1988, plaintiff's car was entered, and the

contents of the trunk were upturned. On or about March 18, 1988, the loud sounds of shaking and rolling dice began to emanate again from the nearby apartment when plaintiff came or went from his home. He received numerous hang-up telephone calls and tape recorded telephone calls. On or about March 19, 1988 after quietly yawning late at night in his home with the drapes shut, plaintiff received a taped telephone call that said, "I'm tired too. Sing me a lullaby before you fall asleep." This and similar calls made plaintiff realize that his home was being monitored. Accordingly, he began to shower and use the toilet in the dark. Thereafter, plaintiff received a taped telephone call of a woman singing the words "no lights

on." On another occasion, a recording of his own voice from a previous conversation was played over the telephone. Plaintiff became frightened about the surveillance of all his activities within his home.

29. On or about March 21, 1988, Plaintiff discovered that his locked apartment had been entered again and personal items were rearranged. Subsequently, plaintiff's locked home was entered repeatedly when he was away. At one point, plaintiff discovered a substance on his bed and sofa that caused him to suffer frightening hallucinations within seconds of lying down on them, or a numbing, tingling sensation, upon touching them. One day in late March, he was repeatedly followed by a bizarrely

dressed woman, who feigned mental illness. Shortly thereafter, he was also followed by an older couple, who said, "Look at him. I know the type. He won't take long."

30. As a result of the harassment, monitoring, and surveillance described above, plaintiff became extremely anxious, suffered extreme emotional distress and became physically ill, including developing colon pain, nausea, diarrhea, and headaches. On April 19, 1988, he admitted himself to the mental health ward of a local hospital.

31. On May 3, 1988, the day before he was released from the hospital, a mysterious deposit was made into one of plaintiff's brokerage accounts in an amount approximately equal to the direct

costs of his short term psychiatric and medical care.

32. After leaving the hospital on May 4, 1988, the campaign of harassment continued from about May 7, 1988. Plaintiff continued to receive harassing telephone calls, often late at night after he had gone to sleep. On or about late May, 1988, his locked apartment was again entered and the same personal items rearranged as before.

33. In early 1989, plaintiff filed Freedom of Information Act ("FOIA") requests with the CIA, the FBI, and the Department of State.

34. On January 22, 1990, plaintiff wrote his Senator, Senator Dave Durenberger, to inquire about what U.S. intelligence activities had been directed

against him from 1987 to the present, including whether the federal government had conducted repeated and intrusive unconsented entries into his home and office; intrusive personal surveillance and electronic surveillance; repeated interference of voice and data telecommunications and harassing phone calls; and extensively used subliminal and overt psychological methods of harassment and intimidation.

35. On or about mid January 1989, after initiating the FOIA requests, mail sent to plaintiff from his counsel arrived opened. On or about two days after requesting a Congressional inquiry by Senator Durenberger, plaintiff's office was broken into and the dead-bolted, cipher-locked door was pushed

through the door frame.

36. On April 20, 1990, Senator Durenberger wrote to inform plaintiff of a reply to his inquiry by the FBI's Inspector-in-Charge, John Collingwood. Mr. Collingwood's letter states that plaintiff contacted FBI representatives in December, 1986, to provide information of investigative interest to the FBI. This was the first time that plaintiff knew that the FBI was involved in the investigation of the Soviet mathematician and Eastern bloc scientists, and that the FBI was a party to the harassment and attacks that were made upon him.

37. The 15 documents released by the FBI on or about July 11, 1990 and March 12, 1992, corroborated the events plaintiff had experienced in Switzerland

in late 1986. One declassified document indicated that Ms. Levenson was in fact an FBI employee rather than a State Dept. Official. Another document indicated that the State Department was involved in an investigation involving Dr. Black, and probably in the later harassment of plaintiff.

38. As plaintiff indicated in his January 22, 1990 letter to Senator Durenberger, the same campaign of harassment and psychological intimidation, including repeated and intrusive unconsented entries into his home and office, intrusive personal surveillance and electronic surveillance, repeated interference of his voice and data telecommunications, harassing phone calls, and extensive use of subliminal

and overt psychological methods, that started in October, 1987, had continued up to the date of that letter.

39. On January 15, 1990, upon information and belief, government agents instigated additional intrusive personal surveillance, and tampered with the lighting in plaintiff's home. On or about January 24, 1990 two days after plaintiff's letter to Senator Durenberger, government agents, upon information and belief, broke into plaintiff's office by pushing the cipher-locked dead-bolted door through the door frame. In the context of the actions committed previously these actions constituted extreme and outrageous conduct that was intentional, willful and reckless and which caused the plaintiff

severe emotional distress with physical manifestations of a painful colon disorder, nausea and diarrhea.

40. In October, 1991, after plaintiff went to Guatemala and Nicaragua, where he supported human rights activists who oppose certain United States foreign policies, his house sitter was driven out of his house by a strange whispering message left on his answering machine.

41. When plaintiff arrived home on October 27, 1991, strange "ring-backs" began occurring on his phone. In these "ring-backs", after making a call and hanging up, the callers immediately received a call back. When the original caller picked up the phone, the other party would immediately hang up or remain

silent. From October 27, 1991 to about December 1, 1991, two other persons besides plaintiff who heard these call-backs complained about them to the plaintiff. The phone company could not explain these occurrences to plaintiff, although a retired telephone company employee told him that "somebody was messing with your phone."

42. On August 31, 1992, a message was left on plaintiff's answering machine with sounds of rolling dice in a casino, and noises that appeared to be people betting in the background. Near the end of the message a background voice yelled out, "You making any money?" This message was similar to and a continuation of the rolling dice sounds that had been used to harass plaintiff previously.

This type of message was repeatedly left on his machine for one week until he left on a trip to Great Britain.

43. Shortly after plaintiff returned from Great Britain, on or about September 20, 1992, just after the complaint was filed, plaintiff's locked garage was broken into, and someone tampered with the overhead light.

44. In the context of the actions committed previously these actions of harassment described in paragraphs 40 through 43 constituted extreme and outrageous conduct that was intentional, willful and reckless and which caused plaintiff severe emotional distress with physical manifestations of a painful colon disorder, nausea and diarrhea.

45. Before meeting Ms. Levenson and

Nielson, plaintiff had led a normal, productive work life, and had never gotten caught up in any type of complaint or investigation. He had been physically and psychologically healthy. Before 1987, he had never see, or even considered seeing, a mental health professional. There simply was nothing in his work or interpersonal life that could have caused the harmful things that occurred to him.

46. As a result of defendants' campaign of harassment and psychological intimidation and experimentation, plaintiff has suffered, and continues to suffer, flashbacks, periodic depression, and problems with his colon. Because of the use of unusual psychiatric methods in these attacks, effective treatment of his

psychological injuries through conventional methods has not been possible.

47. Neither Nielson nor any other official of the U.S. government at any time sought plaintiff's consent, and plaintiff never gave his consent, to use him as an informant or as a subject of experimental research. Without his consent, the government has had no justification for the illegal harassment and attacks directed against him.

48. Plaintiff has fully exhausted his administrative remedies with respect to his Federal Tort Claims Act claims, by filing administrative claims against the CIA and FBI on January 6, 1992.

COUNT ONE -- INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (FTCA)

49. Plaintiff incorporates by

reference the allegations in paragraphs 1 through 48 above, as though restated.

50. Defendant United States' harassment of and psychological attacks against plaintiff, including repeated and intrusive unconsented entries into his home and office, intrusive personal surveillance and demonstrations of electronic surveillance, repeated interference with his telecommunications and harassing phone calls, and extensive use of harmful psychological methods and potentially hazardous experiments on plaintiff, constitute extreme and outrageous conduct.

51. Defendants' actions described above were intentional, willful, or reckless.

52. Defendant's actions described

above caused plaintiff severe emotional distress with physical manifestations of a painful colon disorder, nausea, diarrhea, and an uncontrollable facial tick.

53. Defendants' actions described above proximately caused plaintiff permanent physical injury, emotional and mental pain and suffering, emotional distress, loss of enjoyment of life, loss of income, employment benefits and other financial benefits.

COUNT TWO -- VIOLATIONS OF PLAINTIFF'S FOURTH AMENDMENT RIGHTS (BIVENS)

54. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 48 above, as though restated.

55. The harassment of plaintiff and

psychological attacks by defendants Olin Peter Nielson and John or Jane Does One Through Ten, Unknown Officials of the CIA, the Federal Bureau of Investigation and the Department of State, against plaintiff, including repeated and intrusive unconsented entries into his home and office, intrusive personal surveillance and demonstrations of electronic surveillance, repeated interference with his telecommunications and harassing phone calls, and extensive use of harmful psychological methods and potentially hazardous experiments on plaintiff, constitute violations of plaintiff's Fourth Amendment rights to be secure in his person, house, papers and effects against unreasonable searches and seizures.

56. Plaintiff has no other statutory or legal remedy for redress of his injuries caused by defendants' unreasonable searches and seizures, which constituted an invasion of his privacy.

57. Defendants' violations of plaintiff's Fourth Amendment rights, described above, violate clearly established constitutional rights of plaintiff, of which the defendants were well aware, and of which a reasonable person would have known.

58. As a direct and proximate result of defendants' violations of plaintiff's Fourth Amendment rights described above, plaintiff has suffered permanent physical injury, emotional and mental pain and suffering, emotional distress, and loss of enjoyment of life, loss of income,

employment benefits and other financial benefits.

Requested Relief

NOW WHEREFORE plaintiff prays this court to order the following:

1. Award plaintiff compensatory and consequential damages in an amount to be determined, but in no event less than $5,000,000;

2. Award plaintiff punitive damages against the individual defendants in an amount to be determined;

3. Issue a declaratory judgment declaring that defendants' conduct violated plaintiff's constitutional rights; and

4. Grant such other relief as this court deems just.

William C. Black, Jr.
pro se
400 Janalyn Circle
Golden Valley, MN 55416-3325
Tel: (612) 550-1868

Dated: April 27, 1993

JURY DEMAND

Plaintiff demands a jury of 12 as to all claims so triable.

William C. Black, Jr.
pro se
400 Janalyn Circle
Golden Valley, MN 55416

Dated: April 27, 1993

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Complaint for Declaratory Judgment and Damages and Jury Demand has been served on defendant United States by sending a copy by first class mail, postage pre-paid, this 27th day of April, 1993, to:

Gordon W. Daiger, Esquire
Matthew T. Fricker, Esquire
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 7146
Ben Franklin Station
Washington, D.C. 20044

_____
William C. Black, Jr.

(H)

Supreme Court, U.S.
FILED
MAR 22 1996
CLERK

No. 95-803

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. BLACK, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the United States may assert the state secrets privilege to prevent discovery of information sought by plaintiff to support constitutional tort claims asserted under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether dismissal of this action was appropriate where, in the absence of information protected by the state secrets privilege, the plaintiffs could not survive summary judgment.

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UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 62 F.3d 1115. The pertinent opinion of the district court (Pet. App. 25a-54a) is reported at 900 F. Supp. 1129. An earlier opinion of the district court (Pet. App. 55a-95a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1995. The petition for a writ of certiorari was filed on November 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an electrical engineer who, since 1978, has worked in the field of integrated circuit design. Pet. App. 100a (¶ 8). During the 1980s he worked on military-related projects for various defense contractors. *Id.* at 100a-101a (¶¶ 8-9). In connection with his defense contract work, petitioner alleges that he held a security clearance until August of 1987. *Id.* at 102a (¶ 10).

In 1984, petitioner began teaching technical courses on integrated circuit design in the United States, Europe and Asia. Pet. App. 102a (¶ 11). In November, 1986, petitioner lectured at the Swiss Federal Institute of Technology in Zurich, Switzerland. *Ibid.* He alleges that he shared an office there with a Soviet mathematician who asked him "intrusive" questions about "his personal life and business, including about the security of his office at home." *Id.* at 102a-103a (¶¶ 11, 12). The Soviet mathematician also "repeatedly asked to see [petitioner's] airplane ticket." *Id.* at 103a (¶ 12). Petitioner states that he reported his contact with the Soviet mathematician to the United States Consulate in Zurich, and that he later met with Lynn Levenson, an official stationed at the United States embassy in Bern. *Id.* at 103a-104a (¶ 13). He claims to have met with Levenson at her request several more times during his next visit to Switzerland. *Id.* at 104a (¶ 13).

Petitioner alleges that in January, 1987, after he returned to his home in Minnesota, respondent Olin Peter Nielson requested a meeting with him and that Nielson identified himself as an employee of the Central Intelligence Agency (CIA). Pet. App. 104a

(¶ 14). Nielson allegedly questioned petitioner about both Eastern Bloc and American colleagues at the Zurich Institute and about petitioner's future travel plans. *Ibid.* Petitioner states that, at Nielson's request, he met with Lynn Levenson in April, 1987, during a trip to Switzerland, and that Levenson questioned petitioner about the Institute and about his activities and associates. *Id.* at 105a-106a (¶ 16).

Petitioner alleges that in July, 1987, after he returned to the United States, he was again contacted by Nielson, who told him that "people from Washington" wanted to talk to him. Pet. App. 106a (¶ 17). Petitioner alleges he met with Nielson and two other individuals who, he claims, also stated they were CIA employees. The three questioned him about his work in Switzerland, the Soviet mathematician and another Soviet scientist. *Id.* at 106a-107a (¶ 18).

Petitioner asserts that he cooperated with the alleged CIA contacts and questioning because he thought his security clearance required such cooperation, Pet. App. 105a (¶ 15), but that he believed that when his clearance expired in August, 1987, he was no longer required to provide information to the CIA, and thereafter did not report his travel activities or associations to the government officials, *id.* at 107a-108a (¶¶ 19-20). Petitioner alleges that, in 1987 and 1988, after he stopped providing information to officials of the CIA, and because of his refusal to continue that cooperation, he became the subject of a "campaign of harassment and psychological attacks" by employees of the CIA, the FBI and the Department of State. *Id.* at 108a (¶ 21), 113a-116a (¶¶ 28-29).

Petitioner alleges that government officials entered his apartment and office and, among other things, "rearranged" or moved his personal items.

Pet. App. 108a-109a (¶ 21), 115a (¶ 29). He asserts that "shortly after a colleague mentioned that 'bugging devices' are easily sewn into carpet and furniture," he noticed that "patterns of sloppy, monofilament stitching appeared several times in [petitioner's] living room carpet." *Id.* at 108a-109a (¶ 21). Soon after a new neighbor moved in, petitioner claims that he heard "loud sounds of shaking and rolling dice" from the neighboring apartment when he entered or left his own apartment. *Id.* at 109a (¶ 22). He also alleges that he received "strange telephone calls," that "false fire alarms began occurring, typically in the early morning hours," and that he was "overtly followed." *Ibid.*

Petitioner alleges that on February 4, 1988, at Nielson's request, petitioner met again with Nielson and three other individuals because "[h]e feared that there would be serious consequences for him if he refused" to meet. Pet. App. 111a (¶ 25). He alleges that, at the meeting and in subsequent phone conversations, Nielson made remarks that petitioner perceived as threatening. *Id.* at 111a-113a (¶¶ 25-27).

Petitioner alleges that these and similar types of harassment continued into 1990. Pet. App. 118a-119a (¶ 35), 120a-124a (¶¶ 38-43). Petitioner claims that, as a result, he suffered severe physical and emotional distress, was forced to seek psychiatric help and to commit himself to a mental health institution. *Id.* at 116a (¶ 30), 124a-125a (¶¶ 44-46).

2. On September 15, 1992, petitioner filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging: (1) that the government breached a duty owed to him to obtain informed consent before using him as an informant or as a "subject of experimental research";

(2) that government officials committed assault and battery against him; and (3) that the alleged conduct of government officials resulted in the intentional infliction of emotional distress. Pet. App. 5a-6a. In addition, petitioner sued Nielson and ten unknown individual officials of the CIA, FBI and Department of Justice and Department of Defense in their individual capacities under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they had violated his Fourth Amendment rights. Pet. App. 5a-7a.

On the government's motion to dismiss the FTCA counts, the district court ruled that petitioner failed to state a claim of negligence because, under Minnesota law, petitioner is not owed any special duty of care in connection with a security clearance or "experimental research." Pet. App. 76a-79a.[1] In addition, the district court dismissed petitioner's assault and battery claims on the grounds that (1) officials of the CIA are not law enforcement officers within the meaning of the proviso to the intentional tort exception in the FTCA, *id.* at 84a-86a, and (2) the only act alleged within the two-year limitations period prior to petitioner's administrative claim was a break-in at his office—an act that does not constitute an assault or battery, *id.* at 89a-91a.[2]

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[1] Under the FTCA, the law of the place where the alleged tortious conduct occurs provides the basis for the cause of action. 28 U.S.C. 1346(b); see *Butts Feed Lots, Inc.* v. *United States*, 690 F.2d 669, 670 (8th Cir. 1982). The standard governing petitioner's negligence claim is thus provided by the law of Minnesota, where petitioner resided and had his office and where most of the alleged tortious conduct occurred.

[2] The FTCA generally does not waive sovereign immunity from claims arising out of assault and battery. 28 U.S.C.

The court held that petitioner had stated sufficient facts to survive a motion to dismiss his claim of intentional infliction of emotional distress, and that, based on a continuing tort theory, the claim was timely. Pet. App. 91a-94a. The court directed petitioner to file an amended complaint with respect to that count, to allege additional facts within the relevant limitations period, and to identify any facts outside the limitations period that might support his allegation of "extreme and outrageous" conduct. *Id.* at 92a-94a & n.10.[3]

Petitioner thereafter filed an amended complaint alleging additional conduct that occurred after Jan-

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2680(h). However, it does waive sovereign immunity for assault and battery claims arising out of acts or omissions of "investigative or law enforcement officers of the United States Government." *Ibid.* The statute defines an investigative or law enforcement officer as any "officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

As the district court noted (Pet. App. 84a), the organic statute of the CIA "specifically provides that the CIA does not have law enforcement powers." 50 U.S.C. 403(d)(3) (1988) (recodified at 50 U.S.C. 403-3(d)(1) (Supp. V 1993)). In addition, Section 2.4 of Executive Order No. 12,333, 3 C.F.R. 212 (1981), generally prohibits the CIA from engaging in electronic surveillance or unconsented searches in the United States. However, because petitioner also alleged that agents of the FBI, who are law enforcement officials within the FTCA proviso, were part of the campaign to harass him, the court addressed the statute of limitations defense as to the assault and battery charge.

[3] The district court dismissed the Departments of State and Defense because petitioner failed to meet the jurisdictional requirement under the FTCA that he first file administrative claims with those Departments. Pet. App. 68a n.4, 88a; see 28 U.S.C. 2675(a).

uary 6, 1990. See Pet. App. 121a-124a (¶¶ 39-43). The amended complaint asserted only claims of intentional infliction of emotional distress under the FTCA, and *Bivens* claims against the individual officials. *Id.* at 126a-131a (¶¶ 49-58).

The United States then filed a public declaration of R. James Woolsey, Director of Central Intelligence and head of the CIA. C.A. App. 70-72. Director Woolsey stated that he had concluded that confirmation or denial of certain information necessary to answer the complaint and respond to discovery requests "would be damaging to the national security interests of the United States." *Id.* at 71. After personally considering the information at issue and the nature of petitioner's claims, Director Woolsey asserted a formal claim of state secrets privilege over information that would tend either to confirm or deny petitioner's "alleged contacts with officers of the United States government, including the identities of the government entities and individuals involved, the nature and purpose of the contacts, and the locations of those contacts." *Id.* at 71-72. In addition to his public declaration, the Director proffered *in camera* classified *ex parte* declarations further explaining the reasons for the privilege.[4]

Recognizing that petitioner's need for the information claimed to be privileged was compelling, the trial court directed the government to submit the classified declarations for its *ex parte* review. Pet. App. 35a & n.5. Based on the classified declarations and the

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[4] The classified declarations are being maintained by the government in a secure facility and will be produced for the Court's review upon request and under appropriate security procedures.

public declaration of Director Woolsey, the court held that the state secrets privilege had been properly asserted. *Id.* at 36a-38a.

The court observed that the government had satisfied the requirements for assertion of the privilege articulated by this Court in *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953): The privilege had been (1) formally asserted in a declaration (2) by the head of the agency that has control over the privileged matter—*i.e.*, by R. James Woolsey, Director of Central Intelligence and head of the CIA, (3) after his personal consideration of the matters. Pet. App. 33a-34a. Specifically, the court ruled:

> that Director Woolsey properly invoked the state secrets privilege, since disclosure of information concerning the identities of government agents, the nature and purposes of their contacts, if any, with Black, or the locations of those contacts would pose a "reasonable danger" to the United States' intelligence-gathering capabilities and diplomatic relations. *See Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). Specifically, confirming or denying Black's allegations that he was contacted by agents of the CIA would provide foreign intelligence analysts with information concerning this nation's intelligence priorities and procedures. *Halkin* v. *Helms*, 690 F.2d 977, 993 (D.C. Cir. 1982) ("*Halkin II*"). In addition, the government's intelligence relationships with other countries could be put at risk, either by requiring the United States to confirm or deny that it (a) conducts intelligence operations in those countries, and (b) has targeted locations in those

> countries as sources of intelligence. *Id.* The same conclusion holds for requiring the United States to release information concerning those topics during discovery—indeed, discovery could present even greater threats to the government's intelligence activities, since discovery would require the government to disclose *specific facts* concerning those subjects.

Id. at 36a-38a.

The court rejected petitioner's contentions that the privilege had been waived by disclosures under the Freedom of Information Act, or that it should be narrowly construed when an intentional tort is alleged. Pet. App. 38a n.7 (citing *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *Maxwell* v. *First National Bank of Maryland*, 143 F.R.D. 590 (D. Md. 1992), aff'd, 998 F.2d 1009 (4th Cir. 1993) (Table), cert. denied, 114 S. Ct. 920 (1994)). The court also rejected petitioner's contention that the privilege was unavailable to shield allegedly illegal conduct by the government, stating that "the government's submissions in support of the privilege establish that it is being asserted in the interest of national security, and not to hide illegal acts." Pet. App. 38a n.7. The court thus concluded that information concerning "the identities of any government agents who may have contacted Black, the nature and purposes of those contacts" is "*absolutely* privileged from confirmation or denial in a responsive pleading and discovery." *Id.* at 38a.

The court then considered whether and how the case could proceed without the privileged evidence. Pet. App. 42a-53a. It noted that the effect of the privil-

ege is completely to remove the privileged information from the case. *Id.* at 42a. It also observed, however, that dismissal of claims "should be invoked '[o]nly when no amount of effort and care on the part of the court and the parties will safeguard [the] privileged material.'" *Id.* at 44a (quoting *Fitzgerald* v. *Penthouse International, Ltd.*, 776 F.2d 1236, 1243-1244 (4th Cir. 1985)).

Applying this standard, the court held that both claims must be dismissed.[5] Regarding the claim of intentional infliction of emotional distress, the court noted that petitioner lacked evidence that the persons who engaged in the alleged tortious conduct were government employees. The identities and government employment, if any, of the individuals named in the complaint are subject to the privilege. Moreover, the court observed that petitioner could not prove the factual allegations of the complaint and, in particular, the alleged continuing contacts between petitioner and government officials, because those allegations "are so tied to the privileged information that further litigation will constitute an undue threat that privileged information will be disclosed." Pet. App. 46a-47a. The court concluded that petitioner could not proceed with his *Bivens* claims because of the privileged nature of information needed to prove those claims, *i.e.*, the identities of the alleged wrongdoers, their relationship to the government, and their contacts with petitioner. *Id.* at 50a-52a.

The court rejected petitioner's contention that the trial could proceed *in camera*, concluding that such a

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[5] Because it considered matters outside the pleadings, the court treated the motion as one for summary judgment. Pet. App. 40a-42a.

procedure was not a reasonable alternative in this case. Pet. App. 46a n.11. That decision followed in part from the court's conclusion that it would be inappropriate for petitioner or his counsel to participate in an *in camera* examination of privileged material, notwithstanding that they may have been granted security clearances in connection with other responsibilities. *Id.* at 35a n.6. The court also rejected petitioner's contention that recognition of the privilege would be unduly harsh and unfair:

> When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect a greater public value.

Id. at 49a n.12 (quoting *Fitzgerald*, 776 F.2d at 1238 n.3).

3. The court of appeals affirmed. The court held that the privilege applies to information that, if disclosed, would impair defense capabilities, reveal intelligence sources and methods, disrupt diplomatic relations with foreign governments or harm the national security. Pet. App. 13a (citing *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984), and *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991)). Recognizing that the roots of the privilege are more than a century old, the court rejected petitioner's contention that the privilege is a "'creature' of the Cold War," and thus obsolete. Pet. App. 14a-15a & n.4. The court of appeals noted that international destabilization since the collapse of the Soviet Union may make the privilege "all the more important." *Id.* at 15a.

The court of appeals reviewed *in camera* and *ex parte* the classified declarations supporting the claim of privilege. Pet. App. 18a-19a. Based on that review and the information in the public record, the court concluded that the government's assertion of the privilege "was not overbroad." *Id.* at 19a. The court held that "[t]he information covered by the privilege is at the core of Black's claims, and we are satisfied that the litigation cannot be tailored to accommodate the loss of the privileged information." *Ibid.*

The court of appeals also rejected petitioner's contention that the CIA was engaged in *ultra vires* conduct, *i.e.*, domestic surveillance, and was thus precluded from asserting the state secrets privilege. The court held that, "[i]f [petitioner] is correct about CIA surveillance of him, and we assume *arguendo* that he is, his reported contact with a suspicious foreign national outside the United States places the matter in the arena of foreign activity and thus within the CIA's competence." Pet. App. 21a-22a. Alternatively, assuming that the FBI was responsible for the alleged domestic surveillance, "no case has been made out for *ultra vires* activity" because domestic surveillance is within the FBI's mission. *Id.* at 22a. In view of all the available evidence, the court concluded that "*if* any activities were conducted by the government in connection with Black, they were not *ultra vires*." *Id.* at 23a.[6]

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[6] The court of appeals also sustained the district court's dismissal of the Departments of State and Defense as defendants. The court held that application of the state secrets privilege moots the issue.

ARGUMENT

1. The doctrine of state secrets bars litigants from discovering or utilizing at trial information the disclosure of which would be contrary to national security. See, *e.g.*, *Totten* v. *United States*, 92 U.S. 105 (1876); *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). The privilege may be invoked by the head of a governmental department with responsibility over the matter in question, and the department head must have personally considered the matter. See *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953).

Petitioner does not dispute that the government has satisfied the formal requisites for the assertion of the state secrets privilege. Petitioner bases his argument in this Court on the fact that the privilege has been asserted in a case in which he has alleged a constitutional tort as well as a claim under the Federal Tort Claims Act. He notes that the only occasion on which this Court has addressed the state secrets privilege, *United States* v. *Reynolds*, *supra*, involved a common-law tort claim under the FTCA, which occurred during a time of national defense buildup. Petitioner contends that *Reynolds* cannot apply where the claim rests on a constitutional violation.

The state secrets privilege is not limited to FTCA cases. See, *e.g.*, *Ellsberg* v. *Mitchell*, 709 F.2d 51 (D.C. Cir. 1983) (applying state secrets privilege to Fourth

Amendment *Bivens* claim), cert. denied, 465 U.S. 1038 (1984). It is the nature of the information sought to be protected, not the nature of the litigation in which the privilege is asserted, that determines whether the privilege is appropriate. The privilege is recognized in order to protect the national interest in safeguarding United States defense capabilities and diplomatic relations. It applies to prevent disclosure of national-security information where revealing the information would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *Ellsberg*, 709 F.2d at 57. The state secrets privilege thus applies without regard to the kind of case or theory of recovery for which the information is sought.

Once the court is satisfied that the privilege is correctly asserted, "even the most compelling necessity cannot overcome the claim of privilege." *Reynolds*, 345 U.S. at 11. "When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege." *Ellsberg* v. *Mitchell*, 709 F.2d at 57 (footnote omitted); *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), cert. dismissed *sub nom. United States* v. *Albertson*, 493 U.S. 960 (1989); accord *In re Under Seal*, 945 F.2d 1285, 1288 (4th Cir. 1991); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546-547 (2d Cir. 1991). Thus, if the court is satisfied that state secrets are at stake, an individual litigant must bear the "burden of protection of a public value." *Fitzgerald*, 776 F.2d at 1238 n.3. The

principles articulated by the Court in *Reynolds* have become well-settled in the lower courts.[7]

Petitioner contends (Pet. 25) that the *in camera* presentation of the basis for the claim of privilege in this case was given "uncritical acceptance by the judiciary." Those courts, however, each carefully examined the claim of privilege and the context in which it arose. Both courts closely examined the nature of petitioner's claims, and the relationship between those claims and the privileged information. Both conducted an *in camera, ex parte* review of the classified affidavits detailing the need for the privilege. Both were satisfied that the privilege was properly asserted, and that the case could not proceed without the privileged information.

Information concerning intelligence sources and methods would be exposed if the United States were compelled to admit or deny the averments in the amended complaint that allege contacts with intelligence officials of the United States. Such exposure would also occur if the United States were required to respond to discovery requests and offer proof in its defense at trial. The claim of privilege filed by the Director of Central Intelligence asserts a public interest in protecting such sensitive information from disclosure in this litigation. Director of Central Intelligence Woolsey concluded

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[7] See, *e.g., Zuckerbraun, supra*; *Clift* v. *United States*, 597 F.2d 826 (2d Cir. 1979); *Patterson by Patterson* v. *FBI*, 893 F.2d 595 (3d Cir.), cert. denied, 498 U.S. 812 (1990); *Fitzgerald, supra*; *Farnsworth Cannon, supra*; *Maxwell, supra*; *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Ellsberg, supra*; *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989).

> that any details about [petitioner's] alleged contacts with officers of the United States government, including the identities of the government entities and individuals involved, the nature and purpose of the contacts, and the locations of those contacts should be, in the national interest, absolutely privileged from confirmation or denial. I have determined that the disclosure of these matters in this litigation, or otherwise, reasonably could be expected to cause serious damage to the national security.

C.A. App. 72 (¶ 5).[8]

2. Once the district court had concluded that the state secrets privilege was applicable in this case, it decided not only to prohibit discovery, but also to dismiss petitioner's action. "Once invoked, the effect of the privilege is to exclude the evidence from the

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[8] After he filed his Petition for Writ of Certiorari, petitioner by letter to the Solicitor General raised a question whether the information at issue must remain privileged in light of "recent disclosures" by the Assassination Records Review Board (Kennedy Assassination) of FBI documents concerning its investigation of Lee Harvey Oswald while he was in the Soviet Union in 1960 and 1961. Those documents contained some information provided by the Swiss government. Petitioner surmises that the claim of privilege here has been asserted to protect U.S. intelligence-gathering activities in Switzerland and relations with the Swiss government—matters that, in petitioner's view, have now been disclosed.

The events involved in petitioner's case concern a time period considerably later than that involved in the Kennedy assassination. See *Fitzgibbon* v. *CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). The Director of Central Intelligence has considered petitioner's contention and reaffirms the continuing need to protect the information covered by the assertion of privilege in this case.

case." *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d at 546; accord *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Ellsberg*, 709 F.2d at 65. Without evidence regarding the relationship, if any, between the individual defendants and the government, petitioner's claims could not survive summary judgment. It is well established that the dismissal of a case is appropriate if the plaintiff cannot prevail, or even make out a prima facie case, without disclosing privileged information. As this Court held in *Weinberger* v. *Catholic Action of Hawaii*:

> public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.

454 U.S. 139, 146-147 (1981) (quoting *Totten* v. *United States*, 92 U.S. at 107).[9] Courts have consistently held

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[9] Petitioner observes (Pet. 20) that *Totten* "does not relate to a state secrets evidentiary privilege." The broader principle upon which *Totten* rests is that, where litigation would require disclosure of information that has been determined to be confidential, no action can be maintained. The Court noted in *Totten* that "suits cannot be maintained which would require a disclosure of the confidences" protected by such privileges as attorney-client, husband-wife and physician-patient, and concluded that "[m]uch greater reason exists for the application of the principle to cases of contract for secret services with the government." *Totten*, 92 U.S. at 107.

Petitioner also attempts to distinguish *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), a criminal case. While *Burr* did not rest on an assertion of the state secrets privilege, Chief Justice Marshall recognized "[t]hat

that where, as here, a claim cannot be made out in the absence of information covered by the state secrets privilege and the litigation cannot be tailored to protect the privilege, dismissal of the claims is the appropriate course. See, *e.g.*, *In re Under Seal*, 945 F.2d at 1286, 1290; *Zuckerbraun*, 935 F.2d at 545, 548; *Fitzgerald*, 776 F.2d at 1243-1244; *Farnsworth Cannon, Inc.*, 635 F.2d at 281 (en banc) (per curiam).

The district court held that petitioner's claims depend upon his establishing that he had continuing contacts with government officials. Pet. App. 46a. The court concluded that "[s]ince the identity of those employees is privileged, [petitioner] will not have access to facts necessary to establish a genuine issue of material fact as to whether the alleged wrongdoers were, in fact, employees or agents of the government, nor has [petitioner] asserted that he can present a prima facie case even if the information were determined to be privileged." *Ibid.* The Director of Central Intelligence has asserted the state secrets privilege over the information petitioner needs to establish that the individual defendants are government officials. That assertion of privilege is fatal to petitioner's FTCA claim, which cannot succeed unless he can show that the intentional infliction of emotional distress he alleges was inflicted by a government employee. See *id.* at 45a-46a. For the same reason it is also fatal to petitioner's *Bivens* claim, which also requires a showing

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there may be matter, the production of which the court would not require, is certain." *Id.* at 37. The court of appeals appropriately cited *Burr* as a historical root of the state secrets privilege. Pet. App. 14a n.4.

of action by government employees. See *id.* at 51a-53a.

The district court considered whether alternatives to dismissal were practicable that would have permitted the claim to go forward consistent with protection of the privilege, and held that dismissal was required. Pet. App. 42a-53a. The court determined that an *in camera* proceeding was "not a reasonable alternative in this case." *Id.* at 46a-47a & n.11. The court of appeals agreed that "the litigation cannot be tailored to accommodate the loss of the privileged information." *Id.* at 19a. Plaintiff and his counsel do not have the security clearance necessary to review the privileged information *in camera*. Cf. *Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977) (litigation between two cleared defense contractors was conducted in a closed courtroom under tight security procedures without a jury). If an *in camera* proceeding on the merits were conducted *ex parte*, the court would be deprived of the benefit of the adversarial presentation of issues. Dismissal is warranted "when no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Fitzgerald*, 776 F.2d at 1244. In this case, the lower courts reasonably concluded that dismissal was the only practicable means of protecting the privilege.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court Of The United States

OCTOBER TERM, 1995

WILLIAM C. BLACK, JR., Ph.D.,

Petitioner,

v.

UNITED STATES OF AMERICA, et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

No. 95- 803

WILLIAM C. BLACK, JR., Ph.D.,

Petitioner,

v.

UNITED STATES OF AMERICA, et. al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

Petitioner Dr. William C. Black, Jr. respectfully presents this brief in reply to the opposition brief of the

Government in this matter, pursuant to Rule 15 of the Rules of this Court as follows:

ARGUMENT

The government's brief in opposition to the petition for certiorari is unable to cite a case of this Court in which the "state secrets" privilege defeated a constitutionally based claim. Such a result raises the very serious issue of whether the federal government has power under the Constitution to cite national security as authority to deny individual rights guaranteed by the Constitution. In our system of defined and limited government powers such a result should not occur.

The government's reliance on Snepp v. United States is misplaced as that

case was decided not on constitutional grounds implicating Fourth Amendment protections, but on a contract theory based on facts involving an explicit written confidentiality agreement signed by a CIA employee. Snepp, 444 U.S. 507 (1980). The current case by contrast seeks to remedy a violation of the Fourth Amendment rights of the Petitioner to be free from aggressively invasive acts by government agents.

The circuit court decisions cited by the United States do not persuasively discuss the constitutional implications of a claim of government privilege defeating an individual's right under the Fourth Amendment. That issue was not presented in the Reynolds case before this Court which is the authority for the

lower court opinions, and by contrast in Reynolds this Court allowed the Plaintiff's case to go forward. United States v. Reynolds, 345 U.S. 1 (1953).

The government's reliance on Weinberger v. Catholic Action of Hawaii is similarly misplaced, as that case involved a controversy over an environmental impact statement which would be available to the public under the Freedom of Information Act. Weinberger, 454 U.S. 139 (1981). The Court pointed to Exemption 1 of the Freedom of Information Act as authorizing the withholding of national defense or foreign policy information. 5 USC Section 552(b)(1). The quotation cited in the government's brief at page 17 from the Weinberger case is merely a

paraphrase of part of the 1876 Totten decision, and the Reynolds decision, both previously discussed, and on the facts of the case does not create authority for the result in the lower courts.

The government has not addressed in its opposition the holding in the "Pentagon Papers" case in which this Court considered the history of the Bill of Rights and held that the first ten amendments to the Constitution, adopted after the main body of the Constitution, were intended to be limitations on the general powers of government.

"The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution." New York

Times Company v. United States, 403 U.S. 713, 716 (1971). The holding in that case was that the general powers of the federal government, even in the national security area, could not defeat the provisions of the Bill of Rights. Petitioner's case presents the same issue, as his constitutional claim has been defeated by an assertion of the government's power to claim state secrecy, and the legal conclusion is the same- the United States cannot bar his case from the courts.

This case is not one of a mere evidentiary privilege analogous to the husband-wife or physician-patient privileges. The distinction is that it is the government of the United States that invokes a privilege in this case.

The United States stands as a party empowered and restricted in those powers by the Constitution. Use of the evidentiary privilege by the United States must be constrained by those limitations on the federal government in the Constitution. In addition, to the extent that public policy considerations affect the result, the Fourth Amendment states the controlling public policy of protecting the individual from invasive government actions.

Petitioner objects to any ex parte presentation of classified information to this Court as suggested in footnote 4 of the government brief. Such a procedure denies Petitioner his right to adjudication in an adversarial setting in which he can test the claims made ex

parte. This Court has emphasized the need to develop all relevant facts in the adversarial system as fundamental and comprehensive in our system. See United States v. Nixon, 418 U.S. 683,709 (1974). The type of ex parte presentation suggested by the government denies Petitioner his right to due process in having an adversarial adjudication of his claims in our courts. Without the ability to test the government's assertions, facts will not be developed nor will assertions be challenged with the benefit of the knowledge and preparation of Petitioner and his counsel.

In our constitutional system of defined and limited powers of government it would be a grave mistake to give

unlimited power to any part of the government. Preventing Petitioner from pursuing his claim of constitutional violation to conclusion denies him the very protections set out for him in the Bill of Rights, and thus overturns the very basis for the relationship between citizen and government in our constitutional republic.

CONCLUSION

For the foregoing reasons this case presents an important unresolved constitutional issue of great contemporary importance. A writ of certiorari should issue to review the judgement of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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